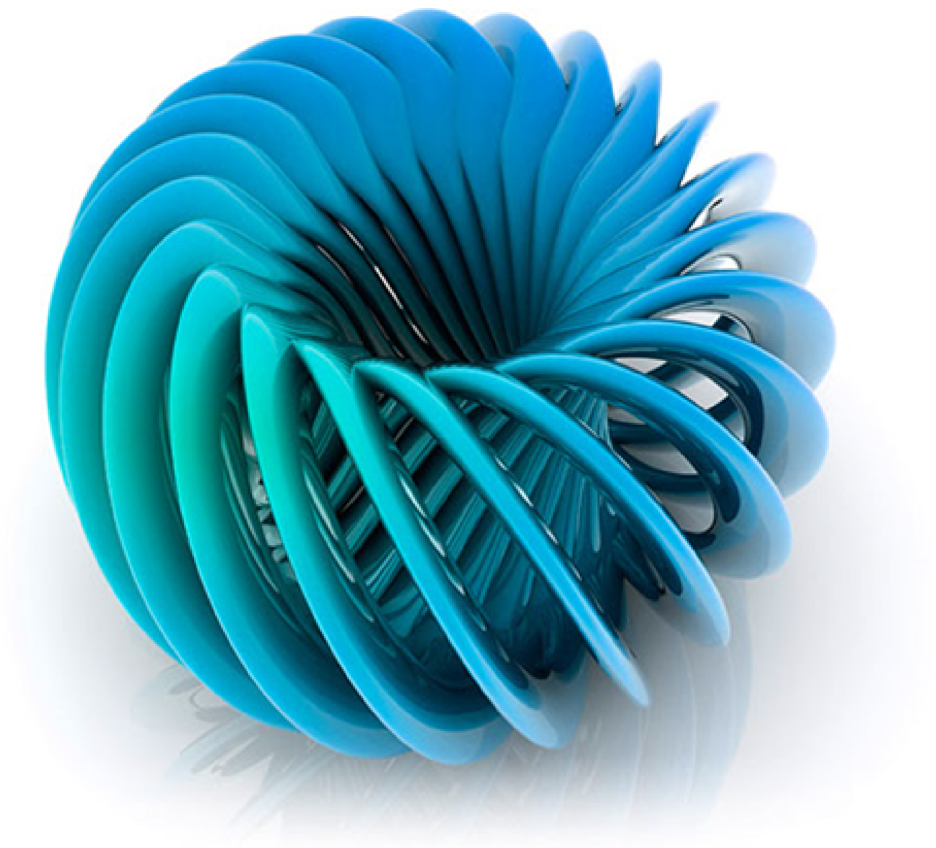
ALLEN & OVERY



13 July 2017

Corporate Governance

Comparative Study

Contents

Introduction and Methodology

In September 2012, Allen & Overy was asked by the Corporate Governance Committee (the **CGC**) to compile a comparative study of the Belgian 2009 Code so that it could assess whether there was a need to make revisions to the Belgian 2009 Code (the **2012 A&O Study**).[1] We compared the Belgian 2009 Code to the codes of France, Germany, the Netherlands and the United Kingdom and, for certain matters, Italy. Even though the Belgian 2009 Code was one of the oldest codes of those compared, and despite the fact that the European corporate governance landscape had been quite vibrant between 2004 and 2009, it was concluded that it was not yet necessary to amend the Belgian 2009 Code.

Five years later, the CGC has asked us to **re-examine whether today there is a need for the CGC to make revisions to the Belgian 2009 Code**.

In assessing such need, we will **firstly analyse the drivers that encourage the revision of national codes**. In our analysis, we map the evolution of the EU corporate governance framework since 2009 and the main amendments to the national codes for listed companies in France, Germany, the Netherlands and the United Kingdom, and, for certain matters, Sweden.

As regards corporate governance, we have observed that there is, at both a European and a national level, an increased focus on:

– the enhancement of transparency;
– the engagement of shareholders; and
– the enhancement of the link between remuneration and performance.

In this context, we note that a revision of the Belgian 2009 Code would present an opportunity to address matters that go beyond the actual content of the Belgian 2009 Code and to reflect on the optimal structure and scope of the Belgian 2009 Code and the best way to influence the behaviour of boards.

Our findings are reflected in part 1 '*Drivers of change, timing and structure*'.

Secondly, we will **examine the nine principles of the Belgian 2009 Code in light of these current corporate governance trends**. For each of the principles, we identify where we believe there is room for improvement, and if relevant, where we could draw on a significantly different approach taken in one of the other jurisdictions studied, which could either be implemented or addressed at the next revision. Where relevant, we compare the provisions of the Belgian 2009 Code **with the corresponding provisions in the national codes of the jurisdictions studied**. Where we believe that the Belgian 2009 Code is adequate, we do not provide a comparative analysis or suggest changes.

Our findings are reflected in part 2 '*Topics for change*', which follows the current structure of the Belgian 2009 Code.

Given the differences in structure, approach and drafting styles of the different national codes, it is difficult to make an overall comparison. Moreover, comparing the corporate governance systems is quite complex because (i) the corporate governance framework is not only set out in the codes, but also in mandatory company, securities and accounting laws and (ii) the corporate governance related regulations have a broader scope than what is currently addressed by the codes. Finally, when comparing the codes, one needs to bear in mind that each of the codes has been developed while taking into account country-specific characteristics such as the governance model of listed companies, the most common shareholding structure and the size of the companies.

We wish to emphasise that the focus of our comparative study relates to **corporate governance *pur sang*** – ie the topics recurring most often in the national codes of the jurisdictions studied – and that it excludes topics closely associated to corporate governance that can be found in the hard law of the jurisdictions studied, such as market abuse, audit, acting in concert, public takeover and transparency. In addition, please note that sector-specific corporate governance rules such as rules for financial institutions and government-owned companies are also excluded from the scope of our analysis.

1 http://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/study_allen_overy.pdf

Executive Summary

Part 1 – Drivers of change, timing and structure

In the last decade, great progress has been made in corporate governance. Unlike the Belgian 2009 Code, the codes of the jurisdictions studied have been updated at least once (and some, several times) with the intention of:

- implementing (or adapting to) European directives, regulations or recommendations;
- avoiding inappropriate discrepancies between the code and the law (eg following a shift from soft law to hard law);
- staying in line with best practice and remaining progressive; and
- clarifying, completing, adding detail and guidance and remedying interpretational issues (based on practical experience).

Since 2009, the year in which the Belgian 2009 Code was updated for the first (and last) time since its creation in 2004, several corporate governance initiatives have been adopted at a European level. In addition, several provisions of the Belgian 2009 Code have found their way into hard law, resulting in discrepancies and/or overlaps between Belgian hard law and the Belgian 2009 Code in domains such as the remuneration of directors, and the rights of shareholders and the audit committee. We have observed that the codes of the jurisdictions studied have been modified not only to take into account changes in hard law, both at a European and a national level, but also to accommodate trends identified at the EU level (including the enhancement of transparency, the engagement of shareholders, and the enhancement of the link between remuneration and performance) and in the corporate governance codes of other jurisdictions.

In addition to accommodating the significant progress made in corporate governance since 2009, a revision of the Belgian 2009 Code would present an opportunity to address matters that go beyond the actual content of the provisions of the Belgian 2009 Code. More specifically, the following questions could and should be addressed:

- How to deal with the migration from soft law to hard law?
- How to structure the Belgian 2009 Code, and what type of rules to use?
- Whether one size fits all?
- To whom should the Belgian 2009 Code be addressed?

Part 2 – Topics for change

Keeping in mind the recent increased focus in the field of corporate governance on:

- the enhancement of transparency;
- the engagement of shareholders; and
- the enhancement of the link between remuneration and performance,

part 2 identifies in relation to the Belgian 2009 Code where there is room for improvement, and if relevant, where a significantly different approach is taken in the jurisdictions studied, which could either be implemented or addressed at the next revision.

It is clear that the Belgian 2009 Code was thought through at the occasion of its revision in 2009: when comparing the provisions of the Belgian 2009 Code with the codes of the jurisdictions studied, no significant gaps can be identified and as such, the Belgian 2009 Code can *anno* 2017 still be considered as advanced (notwithstanding the fact that there is room for improvement in several areas).

Part 1 – Drivers of Change, Timing and Structure

1. Drivers of change

In the last decade, the corporate governance regimes in those jurisdictions studied have undergone extensive change. All of the codes have been updated at least once, and some even several times. We note that, in general, the modification or update of a national code is mainly driven by four different drivers:

MAIN DRIVERS OF CHANGE
– Implementation of or adaptation to European directives, regulations or recommendations (section 1.1). – Avoidance of inappropriate discrepancies between the code and the law (eg following a shift from soft law to hard law) (section 1.2). – Staying in line with best practice and remaining progressive (section 1.3). – Clarifying, completing, adding detail and guidance and remedying interpretation issues (based on practical experience) (section 1.4).

1.1 Driver 1 – implementation of or adaptation to European directives, regulations or recommendations

A 2015 study, by ecoDa in collaboration with Mazars on corporate governance compliance and monitoring in the EU[2] (the **2015 ecoDa Study**), shows that the main reason why countries amend or modify their codes is due to EU and international influence.

As far as EU influence is concerned, the 2002 report of the High Level Group of Company Law Experts on a modern regulatory framework for company law in Europe[3] had a catalyst effect on the European corporate governance debate. In response to this report, the European Commission (the **EC**) adopted an action plan entitled "*Modernising Company Law and Enhancing Corporate Governance in the EU*"[4] in which it defined the key policy objectives for inspiring future action at a European level.

Since 2003, the European corporate governance framework has expanded enormously. Changes occurring in the period between 2003 and 2009 have mostly been included in the Belgian 2009 Code, where relevant. However, since 2009, several European corporate governance initiatives have not yet had the chance of being incorporated into the Belgian 2009 Code.

NON-EXHAUSTIVE OVERVIEW OF THE PRINCIPAL EU CORPORATE GOVERNANCE INITIATIVES SINCE 2009	
Recommendation of the EC as regards the regime for the remuneration of directors of listed companies (2009)	On 30 April 2009, the EC issued Recommendation 2009/385/EC complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies (the **2009 Remuneration Recommendation**, and, together with Recommendations 2004/913/EC and 2005/162/EC, the **Remuneration Recommendations**). In the aftermath of the financial crisis, the EC **sought to strengthen the existing regime for the remuneration of directors of listed companies** through the 2009 Remuneration Recommendation, by issuing principles complementary to those contained in Recommendations 2004/913/EC and 2005/162/EC on the structure of directors' remuneration and the process of

2 ecoDa in collaboration with Mazars, *Corporate Governance Compliance and Monitoring Systems across the EU, 9/2015.*
3 http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf
4 Communication from the EC to the Council and the European Parliament, *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*, COM(2003)284.

	determining remuneration and control over that process (eg recommendations to link components of the variable remuneration to predetermined and measurable performance criteria; set limits on the variable component of variable remuneration; limit termination payments to a certain amount or duration; draft a clear and easily understandable remuneration statement; encourage shareholders to attend general meetings of shareholders where appropriate and to make considered use of their votes regarding directors' remuneration, etc).
Green paper: the EU corporate governance framework (2011)	On 5 April 2011, the EC issued a Green Paper on the EU corporate governance framework[5] (the **2011 Green Paper**). In the 2011 Green Paper, the EC addresses three subjects it considers to be at the heart of corporate governance: (i) boards of directors; (ii) shareholder engagement; and (iii) the application of the 'comply or explain' principle.
Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies (2012)	On 12 December 2012, the EC adopted an Action Plan on European company law and corporate governance – a modern legal framework for more engaged shareholders[6] (the **2012 Action Plan**). In the 2012 Action Plan, the EC outlined the initiatives it intended to take in order to modernise EU company law and the corporate governance framework. It identified three main areas for action: (i) the enhancement of transparency; (ii) the enhancement of shareholder engagement; and (iii) supporting companies' growth and competitiveness.
Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (2013)	On 26 June 2013, the European Parliament and the Council adopted Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC. This Directive made key changes to four EU accounting Directives, established the rule that the board is subject to collective responsibility; and introduced the obligation for EU-listed companies to provide a corporate governance statement in their annual reports providing information on governance codes, shareholder meetings and powers, shareholders' rights, administrative management, and supervisory bodies and their committees, etc.
Directive 2013/50/EU amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC	On 22 October 2013, the European Parliament and the Council issued Directive 2013/50/EU amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading, and EC Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC. This Directive requires issuers of securities traded on EU-regulated markets to ensure appropriate transparency through a regular flow of information to the markets (eg disclosure of major holdings of all financial instruments that could be used to acquire economic interests in listed companies).

5 COM(2011)164.
6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies*, COM(2012)740.

(2013)	
Recommendation of the EC on the quality of corporate governance reporting (‘comply or explain’) (2014)	On 9 April 2014, the EC issued Recommendation 2014/208/EU on the quality of corporate governance reporting (‘comply or explain’) (the **Comply or Explain Recommendation**). The purpose of the Comply or Explain Recommendation is to provide guidance to companies and to assist them in improving the quality of their corporate governance reporting. The Comply or Explain Recommendation offers a general framework which can be further developed and adapted to the specific national context of each EU member state.
Regulation on specific requirements regarding the statutory audit of public interest entities and repealing EC Decision 2005/909/EC (2014)	On 16 April 2014, the European Parliament and the Council issued Regulation 537/2014/EU on specific requirements regarding the statutory audit of public interest entities and repealing EC Decision 2009/909/EC. By means of this Regulation, the European Parliament and the Council sought to improve the quality of statutory audits across the EU by setting out requirements for carrying out statutory audits of the annual and consolidated financial statements of public interest entities, rules on the organisation and selection of statutory auditors and audit firms by public interest entities to promote their independence and the avoidance of conflicts of interest, and rules on the supervision of statutory auditors and audit firms' compliance with these requirements. Article 16(6) of the Regulation will only apply as of 17 June 2017.
Directive 2014/56/EU amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts (2014)	On 16 April 2014, the European Parliament and the Council issued Directive 2014/56/EU amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts. This Directive introduced, among other things, new rules concerning: (i) the employment by audited entities of former statutory auditors or employees of statutory auditors or audit firms; (ii) the preparation for the statutory audit and the assessment of threats to independence; (iii) the internal organisation of statutory audits and audit firms; (iv) the organisation of the work; (v) the scope of the statutory audit; and (vi) audit reporting, etc. The parts of the Directive relating to the statutory audit of public interest entities have been transferred to Regulation 2005/909/EC (see above).
Regulation on market abuse and repealing Directive 2003/6/EC and Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (2014)	On 16 April 2014, the European Parliament and the Council issued Regulation 596/2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council, and EC Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. Through this Regulation, the European Parliament and the Council sought to update and strengthen the existing market abuse framework by extending its scope to new markets and trading strategies, and introducing new requirements.
Directive 2014/57/EU on criminal sanctions for market abuse (2014)	On 16 April 2014, the European Parliament and the Council issued Directive 2014/57/EU on criminal sanctions for market abuse. Through this Directive, criminal sanctions were established for serious forms of market abuse offences in order to ensure the effective implementation of the EU policy on fighting market abuse.

Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (2014)	On 22 October 2014, the European Parliament and the Council adopted Directive 2014/95/EU amending Directive 2013/34/EU as regards the disclosure of non-financial and diversity information by certain large undertakings and groups (the **Diversity Directive**). On 15 January 2016, the EC launched a web-based public consultation in preparation for issuing non-binding guidelines on methodology for reporting non-financial information. It is intended that these non-binding guidelines will be published as soon as possible in the spring of 2017.[7]
Directive amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, and Directive 2013/34/EU as regards certain elements of the corporate governance statement (2017)	On 9 April 2014, the EC submitted a proposal for a Directive to the European Parliament and the Council for an amendment of Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, and Directive 2013/34/EU as regards certain elements of the corporate governance statement[8] (the **Shareholders' Rights Directive**). On the same date as the submission of the proposal for a Shareholders' Rights Directive, the EC published an impact assessment accompanying the proposal for a Shareholders' Rights Directive and the Comply or Explain Recommendation (the **Impact Assessment**).[9] The Impact Assessment analyses certain corporate governance issues as regards in the area of corporate governance of European listed companies. The EC identified six main issues in this field, being: – insufficient shareholder engagement (see part 2, section 8.2); – insufficient link between the pay and the performance of directors (see part 2, section 7); – lack of shareholder oversight on related- party transactions (see part 2, section 8.4(a)); – doubts on the reliability of proxy advisors (see part 2, section 8.6); – the difficult and costly exercise of rights flowing from shares (see part 2, section 8); and – the inadequate quality of the comply and explain (see section 9). The EC is of the opinion that "*these problems lead to suboptimal corporate governance and a risk of suboptimal and/or excessively short-term focused managerial decisions which result in lost potential for better financial performance of listed companies and lost potential for cross-border investment*".[10] Three years later, on 3 April 2017, the Council approved – an amended version of – the proposal for a Shareholders' Rights Directive.[11] The Shareholders' Rights Directive mainly focuses on: – stronger shareholder rights and facilitation of cross-border voting; – long-term engagement of institutional investors and asset managers; – more transparency of proxy advisors; – "say on pay" for shareholders; and – related party transactions. The Shareholders' Rights Directive will enter into force 24 months after its publication in the Official Journal of the European Union.

7 http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm#news
8 COM(2014)213 final.
9 COM(2014)0127.
10 Impact Assessment, p. 4.
11 Text available at http://data.consilium.europa.eu/doc/document/PE-2-2017-INIT/en/pdf

The corporate governance regulatory framework at the EU level consists of a number of Regulations, Directives and Recommendations:

– **Regulations** contain rules that transcend member states' domestic legislation as they are binding legislative provisions that have direct effect. As such, Regulations confer rights on individuals that the national courts are bound to recognise and enforce. Regulations harmonise the regulatory framework within the EU. In the field of corporate governance, the EC has recently issued Regulations on, *inter alia*, audits and market abuse (see above).
– **Directives** provide a minimum EU corporate governance framework as they lay down certain end results that must be achieved in every member state.[12] National authorities must amend their laws to meet these goals, but are free to decide how to do this. Each Directive specifies the date by which national laws must be amended. Directives are used to bring different national laws into line with each other. However, taking into account the different legal traditions and cultures, there is a broad consensus in the EU that, in principle, national law on corporate governance should not be subject to large-scale harmonisation.[13] In the field of corporate governance, the EC has recently issued Directives on, *inter alia*, shareholders' rights, audits, transparency of listed companies, and market abuse (see above).
– **Recommendations** provide guidance to the national legislators and code developers without being binding. However, through legislation or best practice rules based on the 'comply and explain' principle, member states are invited to take the necessary measures to promote the application of the Recommendations by a certain date. The EC's objective is to promote greater convergence within the EU towards best practice on the topics covered by the Recommendations (such as, for example, directors' remuneration). The EC considers Recommendations to be more suitable than Directives for these topics, as they allow member states to take due account of national corporate governance traditions and practices.[14] In the field of corporate governance, the EC has issued Recommendations, in particular on the independence of non-executive directors on board committees, on the remuneration of directors, and on the quality of corporate governance reporting ('comply or explain') (see above).

With the exception of the Diversity Directive, which had to be transposed into national law by 6 December 2016 and in case not yet necessary, Belgium has implemented or transposed all of the above EU Regulations and Directives on corporate governance and generally adheres to most of the Recommendations. In some instances Belgium has even gone further than is required by the EU regulator. For example, as regards the remuneration of directors, Belgium has implemented extensive set of legal provisions making it a frontrunner in this field. Belgium has also implemented several Recommendations into hard law, although soft law would have been sufficient (eg in relation to independency requirements).

We have also identified a number of topics on which the Belgian 2009 Code differs slightly from the EC Recommendations (non-exhaustive list).

12 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/404&format=HTML&aged=0&language=en&guiLanguage=en

13 Report of the Reflection Group on the Future of EU Company Law, Brussels, 5 April 2011. This contrasts with the EC's recent position on audit requirements stating a clear preference for 'hard law' harmonisation.

14 European Commission Recommendations on directors' remuneration and the role of non-executive and supervisory directors – frequently asked questions, October 2004.

DIFFERENCES BETWEEN THE BELGIAN 2009 CODE AND EU RECOMMENDATIONS
– Belgian corporate governance rules do not reflect the EU recommendation that **the board should disclose (annually) a profile of the board's composition and information on the particular competencies of individual directors that are relevant to their service on the (supervisory) board**, enabling markets and the public to assess whether these competencies remain appropriate over time (see part 2, section 4.2(a)). – Belgian corporate governance rules deviate from the EU recommendation that the board should carry out an annual evaluation of its performance, **only requiring such evaluation to be conducted once every two to three years**. In addition, the EU Recommendation is that the board should make public, at least annually, all adequate information about its internal organisation and the procedures applicable to its activities, including an indication of the extent to which the self-evaluation of the board has led to any material change. **The Belgian corporate governance rules contain a transparency recommendation according to which European listed companies are only required to disclose the method by which a performance evaluation was conducted in their corporate governance statement. However, Belgian corporate governance rules do not expressly recommend public disclosure of the extent to which the self-evaluation performed by the board has led to any material change** (see part 2, section 4.1(b)(i)). – Belgian corporate governance rules do not reflect the EU recommendation that, **on an annual basis, the board should collect data on the professional commitments of its members and should make this information public** in its annual report (see part 2, section 4.3(a)). – Belgian corporate governance rules do not reflect the EC recommendation that **the remuneration committee should ensure that the remuneration of individual executive or managing directors is proportionate to the remuneration of other executive or managing directors and other staff members of the company** (see part 2, section 7.2). – Belgian corporate governance rules do not reflect the EU recommendation that **contractual arrangements with executive or managing directors should include provisions that permit the company to claw back variable components of remuneration that were awarded on the basis of data that subsequently proved to be manifestly misstated** (see part 2, section 7.3). – Belgian corporate governance rules do not reflect the EC recommendation that **the remuneration policy should summarise and explain the company's policy with regard to the terms of the contracts of executive directors** (including, but not limited to, the duration of the contracts, the applicable notice periods, etc) (see part 2, section 7.5). – Belgian corporate governance rules do not reflect the EU recommendation that, **for each departure from an individual recommendation, companies should (i) clearly describe how the decision to depart from the recommendation was taken within the company, and (ii) where applicable, describe the measure taken instead of compliance, and explain how that measure achieved the underlying objective of the specific recommendation or of the code as a whole, or clarify how it contributes to good corporate governance of the company** (see part 2, section 0).

However, it is inherent to the legal nature of these Recommendations that different jurisdictions choose to adopt different approaches.

As announced in the EC's ambitious 2012 Action Plan, more changes are expected in the field of corporate governance. For example, on 14 November 2012, the EC submitted a proposal for a Directive to the European Parliament and the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (the **Gender Balance Proposal**).[15]

The Gender Balance Proposal aims to "*substantially increase the number of women on corporate boards throughout the EU by setting a minimum objective of a 40% presence of the under-represented sex among the non-executive directors of companies listed on stock exchanges and by requiring companies with a lower share of the under-represented sex among the non-executive directors to introduce pre established, clear, neutrally formulated and unambiguous criteria in selection procedures for those positions in order to attain that objective*".[16] The Gender Balance Proposal passed through the first reading in the European Parliament in 2013 but has not yet been adopted by the Council.

15 COM(2012)614.
16 COM(2012)614, p. 5.

NON-EXHAUSTIVE OVERVIEW OF EU INITIATIVES IN THE FIELD OF CORPORATE GOVERNANCE WHICH HAVE NOT (YET) BEEN IMPLEMENTED	
Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (2012)	On 14 November 2012, the EC submitted a proposal for a Directive to the European Parliament and the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (the **Gender Balance Proposal**).[17] The proposal aimed to "*substantially increase the number of women on corporate boards throughout the EU by setting a minimum objective of a 40% presence of the under-represented sex among the non-executive directors of companies listed on stock exchanges and by requiring companies with a lower share of the under-represented sex among the non-executive directors to introduce pre-established, clear, neutrally formulated and unambiguous criteria in selection procedures for those positions in order to attain that objective*".[18] The proposal passed through the first reading in the European Parliament in 2013 but has never been adopted by the Council.
Directive amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, and Directive 2013/34/EU as regards certain elements of the corporate governance statement (2014)	On 9 April 2014, the EC submitted a proposal for a Directive to the European Parliament and the Council for an amendment of Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, and Directive 2013/34/EU as regards certain elements of the corporate governance statement[19] (the **Shareholders' Rights Directive**). The overarching objective of the Shareholders' Rights Directive is "*to contribute to the long-term sustainability of EU companies, to create an attractive environment for shareholders and to enhance cross-border voting by improving the efficiency of the equity investment chain in order to contribute to growth, jobs creation and EU competitiveness*".[20] On 8 July 2015, proposal for the Shareholders' Rights Directive was amended, and subsequently adopted, by the European Parliament by 556 votes to 67, with 80 abstentions.[21] On the same date as the submission of the proposal for the Shareholders' Rights Directive, the EC published an impact assessment accompanying the proposal for the Shareholders' Rights Directive and the Comply or Explain Recommendation (the **Impact Assessment**).[22] The Impact Assessment analyses certain issues in the area of corporate governance of European listed companies. The EC identified six main issues in this field: – insufficient shareholder engagement (see part 2, section 8.2); – insufficient link between the pay and the performance of directors (see part 2, section 7); – lack of shareholder oversight on related party transactions (see part 2, section 8.3(a)); – doubts on the reliability of proxy advisers (see part 2, section 8.5); – the difficult and costly exercise of rights flowing from shares (see part 2, section 8); and

17 COM(2012)614.
18 COM(2012)614, p. 5.
19 COM(2014)213 final.
20 Impact Assessment, p. 45, and Shareholders' Rights Directive, p. 2.
21 http://www.europarl.europa.eu/oeil/popups/sda.do?id=25733&l=en and http://data.consilium.europa.eu/doc/document/PE-2-2017-INIT/en/pdf
22 COM(2014)0127.

	– inadequate quality. The EC is of the opinion that "*these problems lead to suboptimal corporate governance and a risk of suboptimal and/or excessively short-term focused managerial decisions which result in lost potential for better financial performance of listed companies and lost potential for cross-border investment*".[23]

A number of issues included in the Gender Balance Proposal and the Shareholders Rights Directive are not yet covered by the Belgian corporate governance rules.

NON-EXHAUSTIVE OVERVIEW OF NEW TOPICS NOT YET COVERED BY THE BELGIAN 2009 CODE
– The immediate announcement of related-party transactions and the content of the report of the committee of independent directors. – The vote on remuneration policy. – The standardisation of reporting (eg the remuneration report). – The 40% gender representation quota for non-executive directors on corporate boards in publicly listed companies (please note that the Gender Balance Proposal states that member states may provide that the 40% objective is met if listed companies can show that members of the under-represented sex hold at least one-third of all executive or non-executive director positions). – The right for companies to identify their shareholders (please note that, in accordance with the law of 2 May 2007 on disclosure of major holdings in issuers whose shares are admitted to trading on a regulated market, persons acquiring more than 5% of the voting rights (and in increments of 5%) in a company whose shares are admitted to trading on a regulated market are already required to disclose certain identifying information). – The transmission of information to shareholders by intermediaries if a company chooses not to directly communicate with its shareholders. – The facilitation of the exercise of shareholders' rights by intermediaries. – The treatment of costs of intermediaries for services relating to the identification of shareholders, the transmission of information to shareholders and the facilitation of the exercise of shareholders' rights. – The disclosure of the policy on shareholder engagement by institutional investors and asset managers. – The disclosure of the equity investment strategy of institutional investors and arrangements with asset managers. – The transparency of asset managers. – The transparency of proxy advisers.

When updating the Belgian 2009 Code, code developers may consider taking into account some of these new developments (ahead of their approval by the EC) or, on the other hand, may want to wish until the European framework has crystallised further. It is expected that several of these topics will become mandatory law.

1.2 Driver 2 – avoidance of inappropriate discrepancies between the code and the law

According to the EC, good corporate governance is first and foremost the responsibility of the company concerned. However, rules at European and national level are in place to ensure that certain (minimum) standards are observed. These include legislation and soft law, namely national corporate governance codes.[24]

In recent years, the corporate governance landscape has been characterised by **a migration of a number of corporate governance topics from soft law to hard law**, especially in the field of remuneration, director independence, audit committee and shareholders' rights.

[23] Impact Assessment, p. 4.
[24] Comply or Explain Recommendation, recital 1.

We have identified a number of **reasons** underlying this migration:

- as set out above in section 1.1, the migration from soft law to hard law often happens under the influence of European legislation or recommendations;
- in response to societal pressure or a political crisis;
- the attainment of a certain state of maturity of a certain rule or principle (eg the audit committee, which the EC described over a process of time as having a public interest function);[25] and
- a (perceived) lack of compliance with certain principles (eg remuneration or gender diversity).

However, it must be noted that, in the field of corporate governance, **legislative action also has its flaws**:

- The general character of laws renders them less appropriate to the complexity of modern companies; codes are more suitable when different solutions to achieve certain corporate governance goals exist, when companies require flexibility (eg the functioning and structuring of boards), when market practices still need to be developed for certain topics, and when one has to take into account sector-specific characteristics or circumstances.
- Hard law (and enforceability) requires a 'measurable' obligation or prohibition; general principles (eg "*diversity should be taken into account*") must be translated into specific, measurable rules (eg "*one-third of the members must be of another gender*"), which cannot easily evolve with the changing economic environment and may not be the appropriate 'translation' of that principle or objective for all types of companies.

On the other hand, legislation is an appropriate tool to (i) ensure that the essential legal infrastructure is available and operates efficiently (eg the facilitation of shareholder voting) and (ii) set generally accepted minimum standards with more 'teeth'.[26]

The transposition of parts of a governance code into hard law sometimes **makes it difficult for companies to have a clear view of where flexibility is still permitted** and where regulation has removed this option and may lead to (as the case may be, conflicting) overlap between the provisions in a code and the law.

Since it was last amended in 2009, a significant number of matters covered by the Belgian 2009 Code have been included in the Belgian Companies Code (the **Company Law**) (see part 1, section 3.1 below). The code developers will have to **consider the impact of the evolving company law on the corporate governance code**.

1.3 Driver 3 – staying in line with best practice and societal expectations and remaining progressive

Code developers are increasingly looking to other countries, international codes, best practices and societal expectations when revising their national corporate governance codes.[27] This comparison allows code developers to develop a code which is up-to-date and in line with best practice.

Since September 2012, the year of our previous comparative analysis of the Belgian 2009 Code, each of the studied jurisdictions has made progress in the field of corporate governance. This progress can be attributed to the influence of the EU, the shift from hard law to soft law, (perceived) best practices and market expectations and lessons learned from compliance monitoring. All of the codes, with the exception of the Belgian 2009 Code, have been updated at least once (and some several times).

"Corporate governance is in constant flux. It is important for the Code to remain relevant and up to date, moving in tandem with the spirit of the times"
Dutch Corporate Governance Code Monitoring Committee, Proposal for revision – an invitation to comment, February 2016

To illustrate the **extensive changes in corporate governance that have occurred in the jurisdictions studied**, the jurisdiction-by-jurisdiction summary below focuses on the most significant recent amendments to the respective codes for listed companies. It is to be noted that most of the amendments identified in the overview below are supportive of the corporate governance trends identified at the EU level: the enhancement of transparency, the engagement of shareholders and the link between remuneration and performance.

25 C. Van Der Elst and I. De Poorter, *Upgrading Corporate Governance: auditcomités in het wetboek van vennootschappen*, TRV 2009, 398 (referring to Directive 2006/43/EC).
26 K.J. Hopt, J. Garrido Garcia J., J. Rickford, G. Rossi, J.S. Christensen, J. Simon and J. Winter, *European Corporate Governance in company law and codes*, Report prepared for the European Corporate Governance Conference of October 18, the Hague, the Netherlands, p. 63.
27 2015 ecoDa Study, p. 11.

COUNTRY	YEAR OF REVISION	PRINCIPAL AMENDMENTS SINCE 2012
Belgium **The Belgian 2009 Code**	2004 (first code) 2009	The Belgian 2009 Code has not been amended since 2009.
France AFEP-MEDEF Corporate Governance Code for listed Companies dated November 2016 (the **French CG Code**) and the Middlenext Code for smaller and mid-sized listed companies	1995 (first code) 1999 2002 2007 2008 2010 2013 2015 2016	Since 2012, the French CG Code has been amended three times (in 2013, 2015 and 2016). **Shareholders' rights** – An advisory vote for shareholders in the event of a disposal of at least half of the company's assets in the past two financial years. Prior to carrying out such disposal, the board of directors must present the shareholders' meeting with a report on the context and progress of the transaction. This presentation is to be followed by an advisory vote by the shareholders. If the meeting votes against it, the board must meet as soon as possible and immediately publish a notice on the company's website detailing how it intends to proceed with the transaction – The introduction of a mandatory vote (although such vote is by definition, not being legally binding as it results only from soft law) for shareholders on the compensation of officers. If the annual general meeting votes against the proposal, the board of directors must meet within a reasonable period of time after the annual general meeting and examine the reasons for this negative vote and the expectations expressed by the shareholders. Following this consultation, and on recommendation of the compensation committee, the board of directors will have to decide on the modifications to be made to the compensation due or awarded in respect of the closed financial year or the future compensation policy. The board of directors must then immediately publish information on the company's website indicating how it has responded to the vote at the shareholders' meeting and report on this issue at the next shareholders' meeting[28] **Remuneration disclosure** – Transparency on multi-year variable compensation, following the same principles as annual variable remuneration – Transparency on start-of-contract pay and the reinforcement of recommendations concerning severance and non-compete compensation **Remuneration** – The reinforcement of recommendations relating to performance conditions applicable to stock options and performance shares, as well as to the requirement to keep shares resulting from the exercise of options or performance shares – Limitation on supplementary pensions to 45% of the reference income – Stricter requirements regarding the conditions permitting the annual definition of the additional rights to supplementary pensions allocated

[28] In France, the shareholders' vote on the officers' compensation of listed French companies (fixed, variable and exceptional elements) shifted from soft law to hard law since the enactment of the French Law named "Loi Sapin II", on 8 November 2016. The general meeting must now approve 'ex ante' the compensation policy as defined in a report to be prepared by the board of directors and submitted to shareholders (describing the principles and criteria for determining, allocating and granting fixed, variable and exceptional elements making up the total compensation and benefits of any kind granted to corporate officers). A negative shareholders' vote on the remuneration policy prevents the implementation of the new policy and results automatically in the application of the remuneration policy then in place). The shareholders shall also vote 'ex post' on the granting of compensation and benefits to each officer for the previous financial year, set out in accordance with the policy previously adopted. In the event of a vote against a resolution (one resolution for each officer being required), the paid fixed element remains effective but the variable elements may not be paid. The legal provisions relating to the 'ex-ante' vote apply as from the ordinary general meeting deciding on the first financial year that ended after the promulgation of the law (2017 meetings) and the 'ex post' vote will apply as from the closing of the financial year following the first financial year ended after the promulgation of the law (2018 meetings, as a rule).

		each year (fair escalation, performance conditions, seniority in the duty; balance with the employees' pension scheme) – If an officer leaves the company before completion of the term envisaged for assessment of the long-term performance criteria, continued entitlement to all or part of the long-term compensation benefit and its payment must be evaluated by the board of directors and the reasons for its decision must be indicated – The remuneration of directors must be competitive, adapted to the strategy and the context of the company, and must promote performance and competitiveness in the medium to long term – Not desirable to award variable compensation, stock options or performance shares to non-executive officers **'Comply or explain'** – The reinforcement of the 'comply-or-explain' principle: the explanation given in the event of non-compliance with a recommendation of the French CG Code should be comprehensible, pertinent and detailed. In addition, the explanation must be substantiated and, in a convincing way, indicate why the specific situation justifies a derogation. Any alternative measures adopted should also be indicated together with the actions taken to maintain conformity with the objectives pursued by the relevant provision of the French CG Code – Establishment in October 2013 of a High Committee composed of experts responsible for (i) monitoring the effective implementation of the corporate governance rules and (ii) proposing amendments if necessary. The High Committee publishes an annual activity report and may be consulted by companies applying the AFEP-MEDEF Code, on a confidential basis **Board functioning** – Reasons must be given for the conclusion of a non-compete agreement at the time a company officer leaves the company in cases where no such clause had previously been stipulated – As part of the definition of the strategic orientation of the company, complete information regarding the most important issues, including in the field of the corporate social and environmental responsibility **Behaviour** – Restriction on the number of offices for executive directors to two other offices in listed companies outside of the group, whereas other directors are restricted to four other offices in listed companies not affiliated with their group – Inclusion of a separate chapter on the deontology of the directors – Obligation to include in the board of directors' internal regulations clear and explicit rules for preventing and managing conflicts of interests – Directors benefiting from compensation based on the company's performance cannot be regarded as independent **Committees** – The inclusion of a specific chapter on directors representing employee shareholders and directors representing employees which specifies that, like any director, they may be appointed by the board to board committees The Middlenext Code has recently updated (in September 2016).

Germany German Corporate Governance Code dated 7 February 2017 (the **German CG Code**)	2002 (first code) 2003 2005 2006 2007 2008 2009 2010 2012 2013 2014 2015 2017	The German Corporate Governance Commission (the **German CG Commission**) generally reviews the German CG Code once a year to consider the need for possible amendments. As such, the German CG Code has been revised four times since September 2012, most recently in February 2017. **Remuneration disclosure** – New recommendations on management board remuneration to improve transparency and comparability – The recommendation that important facts and figures on management board remuneration are prepared in a standardised way in order to improve comparability over time, and with other companies **Remuneration** – The introduction of a cap on individual management board remuneration – The recommendation that the supervisory board shall set the targeted level of retirement provision for the management board – The suggestion that multi-year variable remuneration components should only be paid out after the end of the relevant assessment period – Emphasis of mandatory law that variable remuneration elements generally have a perennial assessment basis, which should essentially be future-oriented **Behaviour** – When making proposals to the shareholders' meeting concerning the election of new members of the supervisory board, the supervisory board shall satisfy itself that the respective candidates can devote the expected amount of time – Introduction in the preamble of the German CG Code of the principle that the social market economy does not only require correct conduct in a legal sense, but also requires ethical and self-responsible behaviour (reference to the principle of honourable businessperson) – In the foreword of the German CG Code, reference is now made to the expectation that institutional investors to exercise their ownership rights actively and responsibly, in accordance with transparent principles that also respect the concept of sustainability **Board functioning** – The supervisory board shall determine a regular duration of membership of the board, on a company-specific basis – The report by the supervisory board shall note if a member of the supervisory board has participated in less than 50% of the meetings of the supervisory board and of the committees to which it belongs in the financial year concerned – Inclusion of recommendations enhancing transparency regarding the criteria for the composition of the supervisory board (eg the supervisory board is to prepare a profile of skills and expertise of the supervisory board; a candidate's proposal is to be accompanied by a CV and an abstract concerning the respective candidate's material activities in addition to its supervisory board position (information to be published on the company's website and to be updated annually)) – In the corporate governance report, the supervisory board shall present its view on whether there are sufficient independent board members and shall list them by name – The chairman of the supervisory board shall not be the chairman of the

		audit committee – Suggestion for the chairman of the supervisory board to be prepared (under appropriate conditions) to discuss topics relevant to the supervisory board with investors **Internal control/internal audit/compliance** – Recommendations that companies shall publish the basic features of their compliance management system. For the implementation of a best-practice compliance system, employees shall be given the opportunity to anonymously report suspected breaches of the law within the company, in a protected manner **Diversity** – In line with the mandate to the German CG Commission, the new statutory provisions on the equal participation of men and women in private sector and public sector management positions that came into effect on 1 May 2015 were incorporated into the German CG Code
Sweden The Swedish Corporate Governance Code applicable from 1 December 2016 (the **Swedish CG Code**)	2005 (first code) 2008 2010 2015 2016	The Swedish CG Code was last revised in 2016. Except for the implementation of the relevant provisions of Directive 2014/56/EU, Regulation 537/2014, Directive 2014/57 and Regulation 596/2014, since the previous revision in 2010, no significant changes have been implemented. **Remuneration** – Simplification of the section on remuneration **Behaviour** – Members of nomination committees must consider possible conflicts of interests before accepting their appointment **Committees** – In line with Regulation 537/2014, the obligation for the nomination committee's proposal to the shareholders' meeting deciding on the appointment of the auditor is to include the audit committee's recommendation (or that of the board of directors, if the company does not have an audit committee). If the proposal differs from the alternative preferred by the audit committee, the reasons for not following the committee's recommendation are to be stated in the proposal. The auditor(s) proposed by the nomination committee must have participated in the audit committee's selection process, provided that the company is obliged to follow such process – The description of the audit committee's responsibilities must be deleted from the Swedish CG Code given that its responsibilities have been included in Swedish law pursuant, to the implementation of Regulation 537/2014 and Directive 2014/56 **Social responsibility** – The board must establish relevant guidelines concerning the company's social responsibility with the aim of ensuring its long-term capacity for value creation **Internal audit/internal control/compliance** – The board is given a broader responsibility for internal controls beyond financial reporting – Corporate governance reports must describe the board's measures for following up internal controls in connection with financial reporting, and whether this process of reporting to the board is working

		Evaluation – The nomination committee must receive the full results of the board evaluation – The corporate governance report must discuss how the board evaluation was conducted and reported on **Diversity** – The nomination committee is to issue a statement on the company's website explaining its proposals regarding the requirements for the composition of the board of directors. For companies above a certain size, such statement must include a description of the diversity policy applied by the nomination committee
The Netherlands The Dutch Corporate Governance Code dated 8 December 2016 (the **Dutch CG Code**)	2003 (first code) 2008 2016	The Corporate Governance Code Monitoring Committee (the **Dutch CG Committee**) has revised the Dutch CG Code twice since 2003. **Remuneration** – The principles and best practice provisions on remuneration are simplified to their core principles, ie the remuneration policy applicable to management board members should be clear and understandable, focus on long-term value creation for the company and its affiliated enterprise, and take into account the internal pay ratios within the enterprise; they should not encourage management board members to pursue their own interest, nor to take risks that are not in keeping with the strategy formulated and the risk appetite that has been established. When drafting the proposal for remuneration of the management board members, the remuneration committee should take note of individual management board members' views on the amount and structure of their own remuneration **Behaviour** – The introduction of a new principle according to which "*the management board is responsible for creating a culture aimed at long-term value creation for the company and its affiliated enterprise*". The supervisory board should supervise the activities of the management board in this regard. In addition, five supporting best practice provisions are included – Management board and supervisory board members who have been nominated for appointment should attend the general meeting at which votes will be cast on their nomination – Management board and supervisory board members should (i) keep their knowledge and skills up to date and spend sufficient time on their duties and responsibilities, and (ii) report any other positions they may hold to the supervisory board in advance, and discuss the other positions at least once a year at the supervisory board meeting. In addition, a management board member's acceptance of supervisory board membership requires supervisory board approval – The expansion of the best practice provision on the induction programme for supervisory board members is to include company culture **Internal control/internal audit/compliance** – The management board is responsible for ensuring that the external auditor receives all information necessary for the performance of its work in a timely manner. The management board should give the external auditor the opportunity to respond to the information that has been provided – The company is to publish a press release in the event of the early

		termination of the relationship with the external audit firm (including the reasons for this early termination) **Committees** – Neither the audit committee, nor the remuneration committee may be chaired by the chairman of the supervisory board or by a former member of the management board – More than half of the members of the audit, remuneration and selection and appointment committees should be independent (as defined in the best practice provision 2.1.8 of the Dutch CG Code) – The audit committee should report annually to the supervisory board on the functioning of, and the developments in, the relationship with the external auditor **'Comply or explain'** – The Dutch CG Committee has adopted the framework for the quality of explanations set out in Recommendation 2014/208 **Board functioning** – In the event of a (proposed) takeover bid for the company's shares, or if the depositary receipts for the company's shares are being prepared, in the event of a private bid for a business unit or a participating interest, where the value of the bid exceeds the threshold referred to in Section 2:107a(1)(c) of the Dutch Civil Code, and/or in the event of other substantial changes in the structure of the organisation, the management board should ensure that the supervisory board is closely involved in the takeover process and/or the change in the structure and in a timely manner – In giving its management report, a management board that works with an executive committee should render account of (i) the choice to work with an executive committee, (ii) the role, duty and composition of the executive committee, and (iii) the nature of contacts between the executive committee and the supervisory board – The appointment period of supervisory board members is now limited (maximum of two four-year terms and two reappointments for a maximum of two years). In the event of a re-appointment after an eight-year term, reasons for the reappointment should be given in the supervisory board's report – The Code has been made slightly more lenient in terms of the number of non-independent supervisory board members that are permitted to have or represent a shareholding of more than 10%. The independence of the supervision continues to be safeguarded, as the Dutch CG Code still stipulates an independent majority – The expansion of the early retirement best practice provision to management board members, and the obligation for the company to issue a press release in the case of early retirement of a supervisory or management board member (stating the reasons for the departure) – The introduction of a best practice provision whereby the supervisory board must ensure that the company has a sound plan in place for the succession of management board and supervisory board members that is aimed at retaining the balance of requisite expertise, experience and diversity **Diversity** – The best practice provisions on composition (with the exception of independency requirements) and size cover both the management board

		and the supervisory board
		– The explanatory notes to the code should clarify that it is important that sufficient expertise is available within the management board, and the supervisory board is to identify opportunities and risks that may be associated with innovations in business models and technologies in a timely manner
		Internal control/internal audit/compliance
		– A best practice provision is to be introduced, requiring that the management board monitors the operation of the internal risk management and control systems and, at least annually, carries out a systematic assessment of their design and effectiveness
		– The internal audit function is to be strengthened by an expansion of the provision and best practice provisions in relation thereto:
		  – further detailing the allocation of responsibilities within the corporate relationships;
		  – intensifying the audit committee's involvement in the functioning of the internal audit function (ie requiring the audit committee's opinion in the assessment of the internal audit's functioning);
		  – embedding safeguards for the effective performance of its duties (ie having sufficient resources at its disposal to execute the internal audit plan, having direct access to information that is important for the performance of its work, and having direct access to the audit committee and the external auditor. Records should be kept on how the audit committee is informed by the internal audit function. In addition, the internal audit function should report its audit results to the management board and the essence of the results to the audit committee and should inform the external auditor); and
		  – clarifying in a best practice provision that the internal audit function should draw up an audit plan involving the management board, the audit committee and the external auditor in this process. This plan should be submitted for approval to the management board and then to the supervisory board. In this internal audit plan, attention should be paid to the interaction with the external auditor
		– A best practice provision is to be introduced, stating that the chief financial officer, the internal auditor and the external auditor should in principle attend the audit committee meetings
		– There is to be greater positioning and more attention placed on the notification of actual and suspected misconduct and irregularities. The management board is to establish a procedure for reporting actual and suspected misconduct and irregularities and then take appropriate follow-up action on the basis of these reports
		– The management report should indicate those material risks (not limited to financial risks) and uncertainties that are relevant to the expectation of the company's continuity for the period of 12 months after the preparation of the report
		Evaluation
		– At least once per year, outside the presence of the management board, the supervisory board should evaluate its own functioning, the functioning of the various supervisory board committees and that of the individual supervisory board members, and should discuss the conclusions that are attached to the evaluation. In doing so, it must pay attention to the substantive aspects, the mutual interaction and the interaction with the

		management board, any events that occurred in practice from which lessons may be learned, and the desired profile, composition, competencies and expertise of the supervisory board – A best practice provision is to be introduced, stating that the management board should, at least annually, evaluate its own functioning as a whole, and that of individual management board members – A best practice provision stating that the supervisory board's report should state how the evaluation of the supervisory board, the various committees and the individual supervisory board members has been carried out, how the evaluation of the management board and the individual management board members has been carried out, and what has been or will be done with the conclusions drawn from the evaluations **Shareholder engagement** – The introduction of a new best practice provision requiring that at the end of the response period stipulated by management[29], the management board should report on the consultation to the relevant shareholder(s) and on the exploration of alternatives to the general meeting. This should be monitored by the supervisory board **Education** – The best practice provision relating to the development of supervisory board members is to be expanded to include management board members **Long-term value creation** – The introduction of a new important principle according to which the management board is to be responsible for the continuity of the company and its affiliated enterprise. It is to focus on long-term value creation for the company and its affiliated enterprise, and take into account the stakeholder interests that are relevant in this context. In addition, several supporting best practice provisions have been introduced
United Kingdom The UK Corporate Governance Code dated April 2016 (the **UK CG Code**)	1992 (first code) 2006 2008 2010 2012 2014 2016	The UK CG Code was last revised in 2016 and it is currently subject to a fundamental review, prior to a formal consultation later in 2017.kattivanoos The UK Stewardship Code has not been updated since September 2012. **Remuneration[30]** – Boards should focus on promoting the long-term success of the company when considering all elements of director remuneration – Performance-related elements of remuneration should be transparent, stretching and rigorously applied, and an appropriate balance should be struck between fixed and performance-related, immediate and deferred remuneration – The design of remuneration arrangements should include provisions that would enable the company to recover sums paid or withhold the payment of any sum **Risk Management and Internal control** – Directors should confirm in the annual report that they have carried out a robust assessment of principal risks, and explain how those risks are being managed or mitigated

29 If one or more shareholders of a company intends to request that an item be included in the agenda that may result in a change in the company's strategy, the management board should be given the opportunity to stipulate a reasonable period in which to respond.

30 A significant amount of UK governance in respect of the disclosure of executive remuneration, including factors considered by the company in setting remuneration, is contained in the statutory Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 (as amended). These regulations were updated 2013 in conjunction with the Companies Act 2006 requirements for listed companies to submit a remuneration report to shareholders on an annual basis and to apply a shareholder approved remuneration policy.

		– Boards must monitor risk management and internal control systems on an on-going basis (in addition to an annual review of effectiveness) and will need to explain any actions taken to remedy any failings or weaknesses identified – The annual report must include two distinct statements: the board's confirmation of the appropriateness of the going concern basis of accounting and a broader assessment of the company's future viability **Committees** – Requirement for the audit committee, as a whole, to have competence relevant to the sector in which the company operates – Requirement for the audit committee to give advance notice of any audit retendering plan in its report (within the annual report) **Shareholder engagement** – Companies should set out how they intend to engage with shareholders on any resolutions that have received a significant proportion of opposing votes

We have compared the Belgian 2009 Code with the codes of the jurisdictions studied in light of these European trends, which has allowed us to identify trending corporate governance topics and potential points for improvement.

It must be noted that each of these codes has been developed taking into account country-specific characteristics such as: (i) the market capitalisation position of listed companies; (ii) (the absence of) reference shareholder power in listed companies; and (iii) the board structure of listed companies.

Based on the main amendments since 2012, as summarised in the table above, we have identified a number of trending corporate governance topics (ie topics for change). The purpose of this high level overview is to illustrate the main trends.

TRENDING TOPICS – AMENDMENTS SINCE 2012						
	France	**Germany**	**Sweden**	**the Netherlands**	**the UK**	**TOTAL**
Remuneration (other than disclosure)	✓	✓	✓	✓	✓	5
Behaviour	✓	✓	✓	✓	✓	5
Committees	✓		✓	✓	✓	4
Internal control/ compliance		✓	✓	✓	✓	4
Board functioning	✓	✓		✓		3
Diversity		✓	✓	✓	✓	4
Remuneration disclosure	✓	✓			✓	3
Comply or explain	✓			✓		2
Evaluation			✓	✓		2
Shareholder engagement				✓	✓	2
Shareholders' rights	✓					1
Social responsibility			✓			1
Education				✓		1
Long-term value creation				✓		1

Given the differences in structure, approach and writing style, it is difficult to draw an overall comparison of the scope of the codes in all of the jurisdictions studied. The topics covered in the French, Dutch, German and UK codes are generally also covered in the Belgian 2009 Code. In part 2, we will examine the nine principles of the Belgian 2009 Code in light of these trending corporate governance topics.

When comparing codes, code developers must consider the codes' particular corporate environment: the specific legal context, the existing balance of powers and national specificities (for example, as is the case in Belgium, a predominantly controlled ownership structure or a significant presence of small listed companies).

1.4 Driver 4 – based on practical experience

The code developers may decide to modify or to update their codes based on their practical experience. In this respect, information included in reports monitoring compliance with the respective codes plays an important role. Monitoring reports can provide information on the reasons why companies choose whether or not to comply with specific provisions of a code. Indeed, if a provision of a code is not adhered to, this does not necessarily mean that the provision needs to be amended or updated. It is important to understand the rationale underlying a company's decision to not comply with a specific provision. For example, we have identified, among other things, the following reasons why companies do not comply with a specific provision of a code which do not necessarily necessitate a modification of a code:

- The remuneration practices in certain sectors (eg high-tech start-up companies may decide to partially remunerate non-executive directors with equity-linked securities).
- Temporary situations (eg the sudden departure of an independent director may lead to a company not being compliant with the required ratio of independent directors prescribed by a code).
- The size of the company (eg small companies may decide to reduce the administrative burden and not to appoint a secretary to the board, an internal auditor or a separate nomination committee).
- The complexity of the sector in which a company is active (eg the appointment of a director for a period longer than the maximum period prescribed by the code may be explained by the complexity of the sector in which a company is active).

If certain provisions are not complied with for justified reasons, there is no need to amend the relevant provisions of the code.

However, it could also be the case that a provision of a code is not adhered to because it is not supported by the business community at large, or because it is not clear enough. In such case, the code developers could clarify, complete, add more detail and/or guidance or remedy any interpretational issues. This can be done by amending the code or, for example, by providing explanatory notes (eg as is currently the case for remuneration (see part 2, section 7 on principle 7); related parties transactions (see part 2, section 8 on principle 8); and the application of the 'comply or explain' principle (see part 2, section 9 on principle 9), etc).

2. Timing

As to the timing of a potential revision of the Belgian 2009 Code, it is important to note that the Belgian government is currently in the process of re-writing and modernising the Company Law.[31] A first draft of the revised Company Law is expected to be published later in 2017.

On 2 October 2015, the Belgian centre for corporate law published a policy statement that was presented to the Belgian House of Representatives (*Kamer van Volksvertegenwoordigers/la Chambre des représentants*) on 3 December 2015 for an exchange of thoughts between the minister of justice Koen Geens and the Belgian centre for corporate law on the modernisation of corporate law. It is expected that quite a number of significant changes will be made to the corporate legal framework, including the abolishment of certain company forms and changes to the *ad nutum* revocability of directors. The envisaged revamping of the Company Law and the fact that the Belgian 2009 Code and the Company Law are closely connected makes the question of how to cope with the combination of hard and soft law as set out in part 1, section 1.2 even more complex. In addition, it raises questions about the timing of a revision of the Belgian 2009 Code.

In our view, there are three options for when to revise the Belgian 2009 Code:

– after the Company Law has been revised: in this respect, it is important to note that a revised version of the Company Law is not likely to enter into force before the end of 2017 and only once a new Company Law has entered into force, will the thought process for the revision of the Belgian 2009 Code commence;
– await the update of the Company Law but, in parallel, start reflecting on and preparing a revision of the Belgian 2009 Code (including identifying the points of improvement by comparing the Belgian 2009 Code with the codes of other jurisdictions, etc); or
– amend the Belgian 2009 Code now without taking into account the fact that a revision of the Company Law is on-going: in such case, there is a risk that the Belgian 2009 Code will have to be amended immediately after the adoption of the new Company Law in order to avoid any discrepancies between soft and (revised) hard law.

It is important to note that the Belgian 2009 Code has been legally embedded as reference code by a royal decree, to which the Belgian 2009 Code is appended. Unlike in France and the United Kingdom, but similar to the situation in the Netherlands, this means that future amendments of the Belgian 2009 Code not only require a decision of the CGC, but also a further royal decree, which complicates the amendment procedure.

31 Federaal Regeerakkoord, 9 October 2014, p.128, http://premier.be/sites/default/files/articles/Accord_de_Gouvernement_-_Regeerakkoord.pdf

3. Structure of the Belgian 2009 Code

A revision of the Belgian 2009 Code presents an opportunity to address matters that go beyond the actual content of the provisions of the Belgian 2009 Code.

The evolving regulatory framework (eg the EU's increased focus on shareholders and the continuing migration from soft law to hard law) may require some changes to the structure of the Belgian 2009 Code. The evolving regulatory framework should at least trigger a reflection over the current legislative approach taken by the developers of the Belgian 2009 Code.

APPROACH TO BE TAKEN IN THE BELGIAN 2009 CODE – REFLECTIONS
– How to deal with the migration to hard law? (section 3.1)
– How to structure the Belgian 2009 Code and what type of rules to use? (section 3.2)
– Whether one size fits all? (section 3.3)
– To whom should the Belgian 2009 Code be addressed? (section 3.4)

3.1 Reflection 1 – How to deal with the migration to hard law?

As set out in section 1.2 above, in recent years the corporate governance landscape has been characterised by the migration of a number of corporate governance topics from soft law (codes) into hard law (laws).

Whether legislative changes to corporate governance imply an amendment of a corporate governance code will depend on the consistency and level of detail, so:

- provisions of the code may remain relevant if they provide more detailed guidelines than the legal provisions;
- if the code provision is less strict, the code provision is no longer relevant;
- if the legal provisions are inconsistent with the code, the code will need to be amended; and
- a pure overlap may enhance the readability and coherence of the code.

In continental Europe, we do not have much experience with soft law and many code developers seem to be struggling with this evolution. Keeping the codes readable for companies and (foreign) investors, maintaining the relevance of the code when entire sections are removed to become law, and the fact that a few important revisions may be more 'digestible' than frequent minor updates, are only a few of the challenges accompanying such evolution.

In some jurisdictions, code developers have opted to completely delete from the code all soft law transposed into hard law, while others still include or reference to legal requirements.[32]

France

The recommendations of the French CG Code, which overlap with the French Commercial Code, are also included in the French CG Code (including a reference to the relevant article of the French Commercial Code).

Germany

The German CG Code contains recommendations (identified in the text by the word 'shall'.) Companies can deviate from them, but are then obliged to disclose this annually and to justify the deviations ('comply or explain'). In addition, the German CG Code contains suggestions which can be deviated from without disclosure (identified in the text by the word 'should'). The sections of the German CG Code without the words 'shall' or 'should' present descriptions of legal regulations and explanations in order to make the German corporate governance system transparent and understandable.

Sweden

In accordance with the Swedish CG Code, the Swedish corporate governance framework includes the Swedish Companies Act and the Swedish Annual Accounts Act, which are supported by the Swedish CG Code and the rules of the regulated markets on which shares are admitted to trading, as well as recommendations and statements from the Swedish Financial Reporting Board and statements by the Swedish Securities Council on what constitutes good practice in the Swedish securities market. The Swedish CG Code complements the

32 2015 ecoDa Study, p. 15.

Swedish Companies Act by placing higher demands on companies for certain matters, while simultaneously allowing them to deviate from rules in individual cases if it is believed that this will lead to better corporate governance.

Where relevant, reference is made in the text of the Swedish CG Code to the relevant provisions of the Swedish Companies Act.

The Netherlands

One of the reasons for amending the Dutch CG Code in 2016 was the overlap between the Dutch CG Code and legislation. In the Dutch CG Code, any overlap with legislation has been avoided as much as possible. However, for the sake of readability and internal coherence, some overlap between the legislation and the Code was unavoidable, if only because the Dutch CG Code supplements statutory provisions.

United Kingdom

According to Schedule B of the UK CG Code, corporate governance disclosure requirements are set out in three places:

- *FCA Disclosure and Transparency Rules sub-chapters 7.1 and 7.2, which set out mandatory disclosures applicable to issuers whose securities are admitted to trading on a regulated market (this includes all issuers with a Premium or Standard Listing);*
- *FCA Listing Rules 9.8.6 R., 9.8.7 R and 9.8.7 A R, which include the 'comply or explain' requirement; and*
- *the UK CG Code.*

The above FCA Listing Rules and the UK CG Code apply to issuers of Premium listed equity shares only.

Areas of overlap between the mandatory disclosures required under the FCA Disclosure and Transparency Rules and those expected under the UK CG Code are summarised in the appendix to schedule B ("Disclosure of corporate governance arrangements") to the UK CG Code. It is further indicated that in respect of disclosures relating to the audit committee and the composition and operation of the board and its committees, compliance with the relevant provisions of the UK CG Code will result in compliance with the relevant rules.

The Companies Act 2006 also contains extensive disclosure requirements and there are a number of separate regulations covering reporting areas such as the gender pay gap and payments to suppliers.

For a better understanding, and for completeness sake, the Belgian 2009 Code contains citations of legal provisions that were transposed into law before 12 March 2009. The citations of these legal provisions are shown in italics.

However, since 2009, a number of topics in the Belgian 2009 Code have been included in the Company Law (eg following the law of 6 April 2010 on the reinforcement of listed companies and the law of 20 December 2010 on the exercise of certain rights of shareholders of listed companies). On its website, the CGC has included an explanatory note comparing the Belgian 2009 Code and the legal obligations arising under the law of 6 April 2010 on the reinforcement of listed companies and the law of 20 December 2010 on the exercise of certain rights of shareholders of listed companies.

On the next modification of the Belgian 2009 Code, Belgian code developers will have to determine how best to handle those sections of the Belgian 2009 Code that now appear in the hard law.

3.2 Reflection 2 – How to structure the Belgian 2009 code and what type of rules to use?

The current Belgian 2009 Code consists of three types of provisions, namely principles, provisions and guidelines. The nine principles (*principes*) are the pillars of good governance and must always be complied with. The provisions (*bepalingen/dispositions*) describe how these nine principles must be applied. The 'comply or explain' principle is applicable to these provisions. The provisions are supplemented by guidelines (*richtlijnen/lignes de conduite*), to which the 'comply or explain' rule does not apply.

In addition, the Belgian CGC has issued certain additional recommendations, referred to as 'practical rules' (*vuistregels/règles pratiques*) (eg for the procedure regarding nomination and re-election of the external auditor and for providing high-quality explanations) or guidance documents (*hulpdocumenten/documents d'aide*) (eg regarding the description of the main features of the company's internal control and risk management systems).

The structure of corporate governance codes varies greatly throughout the EU member states. We have established that the codes of the jurisdictions studied differ mainly in their format (ie whether the provisions are set out as one category or whether they are broken into several categories, such as principles, provisions and guidelines), and in their descriptiveness and level of detail. If the provisions are set out in different categories, the set-up of the different provisions is often related to whether or not the 'comply or explain' principle should apply to the relevant provision. These differences (format and scope/detail) do not necessarily interrelate. As indicated in the study on monitoring commissioned by the EC,[33] the format of the codes (ie the organisation of the provisions) does not necessarily affect their level of detail. We refer you to page 10 of the 2012 A&O Study for more detail on this issue.

Irrespective of the structure of the code, one can distinguish between three types of regulatory/legislative approaches to try and influence the behaviour of boards.

REGULATORY/LEGISLATIVE APPROACHES TO INFLUENCE THE BEHAVIOUR OF BOARDS
– the promotion of transparency (see section 3.2(a));
– a principle-based approach (see section 3.2(b)); and
– a set of specific, quantifiable rules (see section 3.2(c)).

(a) Transparency/disclosure requirements

Instead of imposing or prohibiting certain behaviour, the company is required to merely disclose what it does (eg disclosure of the diversity policy applied by the company). In other words, the code developer does not impose its view on what the best practice is, but merely requests transparency, which is considered as the "best disinfectant". In this case, only the disclosure requirement is the object of the 'comply or explain' principle; in other words, the company must explain why it does not disclose certain information.

It is generally accepted that "*a strong disclosure regime that promotes real transparency is a pivotal feature of market-based monitoring of companies and is central to shareholders' ability to exercise their shareholder rights on an informed basis. Experience shows that disclosure can also be a powerful tool for influencing the behaviour of companies and for protecting investors. By contrast, weak disclosure and non-transparent practices can contribute to unethical behaviour and to a loss of market integrity at great cost, not just to the company and its shareholders but also to the economy as a whole*".[34]

Imposing disclosure, without underlying rules, allows for flexibility and makes the board responsible for determining its own policy and procedure, and may help avoid a 'box-ticking' mentality. However, in order to be effective, this approach requires that shareholders are active and engaged, securitising the annual reports and acting against unacceptable or suboptimal behaviour.

(b) General principles

The code developer imposes a (usually broad) objective or value, without specifying how to reach it or quantifying it (eg the obligation to take into account diversity when nominating new directors or the obligation for directors to update their skills and improve their knowledge of the company to fulfil their roles on both the board and on board committees).

Such a general principle-based approach allows for some flexibility. It requires the board to determine its own policy and procedures, and may help avoid a 'box-ticking' mentality. However, compliance with values and general 'aspirational' principles (if too broad) is sometimes difficult to measure and therefore difficult to monitor or enforce.

(c) Specific rules

The code developer may impose specific recommendations (eg quota). Compliance with these rules is easy to track, however, the translation of a general principle in concrete data (for example, maximum/minimum numbers, time limits or ratios) may not be relevant or appropriate for all types of companies and in all situations.

In general, irrespective of the structure of the codes, almost all codes contain a combination of (i) disclosure requirements, (ii) general principles, and (iii) specific rules.

33 'RiskMetrics Group, BUSINESSEUROPE, ecoDa and Landwell & Associés, *Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States*, September 2009, p. 25.
34 G20/OECD Principles of Corporate Governance, p. 30.

When a practice becomes more and more established, one might expect the general aspirational principles to increasingly be translated into more specific rules.

Codes lend themselves better to general principles than laws, because compliance with general principles is difficult to monitor and therefore non-compliance with general principles is more difficult to sanction. After a migration to hard law, one can expect that the general principles and value-driven recommendations will remain in the code, as they cannot be measured for enforcement and are not 'legal norm material'.

However, the application of the 'comply or explain' principle, which is typical for soft law, is also not evident for general principles or behavioural rules of conduct.

On the occasion of a modification of the Belgian 2009 Code, the Belgian code developers will have to determine, for each topic, what type of legislative technique (transparency, principle/aspirational based approach or specific rules, or a combination of any of these three approaches) is best.

Confronted with a box-ticking, formalistic application of the codes, code developers may be inclined to go beyond the compliance-driven and procedural provisions and include a more performance- and behaviour-based approach. Studies and monitoring reports indeed point out that irrespective of how detailed corporate rules are; actual behaviour, quality and ethics are important.

Code developers may hope that putting in place conduct rules for directors may encourage the desired behaviour and may discourage 'window-dressing' compliance with corporate governance codes. As stated above, the 'comply or explain' principle is difficult to apply to these rules but board evaluation may be the occasion to monitor the company's behavioural rules. In a study by Heidrick & Struggles, it was also recommended to conduct more thorough reviews of board performance that combine an assessment of process and structure with an evaluation of behavioural competencies[35] (see also part 2, section 3 on principle 3 of the Belgian 2009 Code).

3.3 Reflection 3 – Whether one size fits all?

The current Belgian 2009 Code does not include a different set of rules for small- and medium-sized listed companies, but nevertheless allows for flexibility due to the 'comply or explain' approach which can be used by, for example, small- and medium-sized listed companies. The preamble of the Belgian 2009 Code states that, with respect to the 'comply or explain' mechanism, smaller companies, for example, may consider that some provisions are disproportionate or less relevant. The CGC has also drafted Practical Rules for high-quality 'explaining'. Using this approach as impetus, a general debate can be stimulated on the increased utilisation by small- and medium-sized listed companies of the possibility to 'explain'.

In view of the different corporate governance issues faced by small- and medium-sized companies, some jurisdictions already have specific corporate governance codes or rules tailored to these companies.

A salient example is the French Middlenext Code. This code has been specifically designed for small- and medium-sized listed companies, precisely because of their typical characteristics and needs. Taking into account their often different ownership structure, where major shareholders are represented on the board of directors, the Middlenext Code provides corporate governance recommendations for small- and medium-sized listed companies, with a focus on corporate governance issues in connection with the freedom of entrepreneurial action of directors and the protection of minority shareholders.

In other jurisdictions (such as the UK), codes addressed at all listed companies may state that the company's size is to be taken into consideration when applying the recommendations, and these codes include certain provisions which apply only to large companies.

On the occasion of a review of the Belgian 2009 Code, the Belgian code developers must decide how to address small- and medium-sized listed companies.

35 Heidrick & Struggles, *European Corporate Governance Report 2011, Challenging board performance*, 2011, p. 13.

3.4 Reflection 4 – To whom should the Belgian 2009 Code be addressed?

The Belgian 2009 Code is now largely addressed at the board of directors. However, we have observed a trend towards addressing corporate governance issues to a broader audience. Recommendations are no longer addressed only at boards (the main 'audience' of the corporate governance codes) but also to shareholders, individual directors, management and auditors. Alternative tools for the other focus groups may be more adequate.

Shareholders undeniably play a crucial role in the corporate governance of their investee companies, by virtue of the fact that they are generally the primary beneficiaries of the corporate governance rules. Shareholder monitoring of the corporate governance rules and standards is important and often effective.

However, we generally find that the codes impose many duties on the directors to inform and engage with the shareholders, but impose few duties on the shareholders themselves. Noteworthy exceptions are the UK Stewardship Code, which addresses institutional investors directly and, though outside the scope of this study, the Danish Stewardship Code. Another noteworthy technique for addressing institutional investors is used in the Netherlands, where Dutch institutional investors are obliged to include in their annual reports or on their websites a statement about their compliance with the best practice provisions of the Dutch CG Code that are aimed at them (Section 5:86 of the Financial Supervision Act). An investor that has not applied a best practice provision must carefully explain why ('comply or explain') (see part 2, section 9 on principle 9 of the Belgian 2009 Code for further details).

In the German CG Code, institutional investors are addressed only in the preamble (to which the 'comply or explain' principle does not apply); more specifically, they are expected to exercise their rights of ownership actively and respectively, in accordance with transparent principles which also respect the concept of sustainability.

The fact that only a small number of codes impose duties on the directors to inform and engage with the shareholders but few duties are imposed on the shareholders themselves, may partially be explained by the fact that the codes are addressed at listed companies and their boards (and not to their shareholders) and that it is hard to fit shareholder obligations within the 'comply or explain' structure.

When modifying the Belgian 2009 Code, the Belgian code developers must decide whether or not to address individual directors and shareholders of the listed companies that are subject to the Belgian 2009 Code.

CONCLUSION

In each of the jurisdictions studied, any overlaps and conflicts between hard law and soft law are approached differently. In countries where the code is updated regularly, overlaps and conflicts are closely monitored and one can react quickly to any changes. However, in respect of the relationship between the Belgian 2009 Code and the Company Law, a solution which allows companies a clear overview of where flexibility is still permitted and where a regulation (including regulations adopted after the adoption of the Belgian 2009 Code) has gained the upper hand must still be put in place.

Based on what we see in other jurisdictions (see above), there appear to be three ways that the code developers could cope with the shift from soft law to hard law:

– option 1: delete, to the extent possible, all provisions of the Belgian 2009 Code that are already covered by hard law (eg in line with the Dutch CG Code);
– option 2: include, where relevant, references to the provisions of the Company Law in the Belgian 2009 Code (eg in line with the French and Swedish CG Code); or
– option 3: include as an annex to the Belgian 2009 Code an overview of all overlaps between the Belgian 2009 Code and hard law (eg in line with the UK CG Code).

The structure of corporate governance codes varies greatly throughout the EU member states, with differences in format, scope and detail. However, in each of the jurisdictions studied, the code contains, to a certain degree, a combination of different regulatory approaches: disclosure requirements, general principles and specific rules.

When a practice reaches a certain state of maturity and acceptance and behaviour become increasingly aligned, there is a tendency to translate the general principle into a set of specific, quantifiable rules. However, code developers may prefer to resist this tendency, at least for certain topics, to preserve flexibility, to avoid a 'box-ticking' formalistic application of the code and to move back to a more performance- or behaviour-based approach.

With the trend towards addressing corporate governance in a broader context and by addressing recommendations not only to boards but also to shareholders, individual directors, management and auditors, the code developers will need to determine the scope of the code, especially with regard to shareholder engagement. The Belgian 2009 Code is currently addressed at listed companies and their boards and it is not evident which shareholder obligations should be subject to the 'comply or explain' approach.

The French initiative to draft a separate code for small- and medium-sized companies has not been widely followed or copied by other jurisdictions. In several jurisdictions (such as the UK) the codes have taken into consideration the size of the company when applying recommendations. During a review of the Belgian 2009 Code, the Belgian code developers will have to decide how to address small- and medium-sized listed companies.

Based on what we have seen in other jurisdictions, there seem to be three ways that the code developers could address this trend:

– option 1: create a separate code addressed at institutional investors (eg the UK Stewardship Code);
– option 2: embed a legal obligation for institutional investors to 'comply or explain' the provisions of the corporate governance code addressed at them (eg the Dutch CG Code and Dutch hard law); or
– option 3: continue to focus the corporate governance code on boards of directors and directors.

Part 2 – Topics for Change

In this second part of our comparative study, which follows the current structure of the Belgian 2009 Code, we will examine the nine principles of the Belgian 2009 Code taking into account the trending corporate governance topics recorded in part 1 '*Drivers of change, timing and structure*'.

NINE PRINCIPLES OF THE BELGIAN 2009 CODE
– The company shall adopt a clear governance structure (section 1)
– The company shall have an effective and efficient board that takes decisions in the corporate interest (section 2)
– All directors shall demonstrate integrity and commitment (section 3)
– The company shall have a rigorous and transparent procedure for the appointment and evaluation of the board and its members (section 4)
– The board shall set up specialised committees (section 5)
– The company shall define a clear executive management structure (section 6)
– The company shall remunerate directors and executive managers fairly and responsibly (section 7)
– The company shall enter into a dialogue with shareholders and potential shareholders based on a mutual understanding of objectives and concerns (section 8)
– The company shall ensure adequate disclosure of its corporate governance (section 9)

In this part of our comparative study we will, for each of the nine principles of the Belgian 2009 Code, identify where we believe there is room for improvement and indicate where we have identified a significantly different approach being taken in any of the other jurisdictions studied that could be implemented or addressed during the next revision of the Belgian 2009 Code.

Where we believe that the Belgian 2009 Code is well-positioned, we have not provided a comparative analysis or suggested change but, where relevant, we have compared the provisions of the Belgian 2009 Code with the corresponding provisions in the national codes of the jurisdictions studied.

Given that the Belgian 2009 Code is generally well-positioned compared to the jurisdictions studied, we will only examine those topics that are not covered to the same extent in the Belgian 2009 Code.

1. Principle 1: The company shall adopt a clear governance structure

CURRENT TEXT OF THE BELGIAN 2009 CODE
1.1 Every company should be headed by a collegial board. The company should define and disclose the board's terms of reference in its Corporate Governance Charter (hereinafter "CG Charter"). *Guideline The board's role should be to pursue the long-term success of the company by providing entrepreneurial leadership and enabling risks to be assessed and managed.* *Guideline The board's responsibilities should be defined in the articles of association of the company and in the terms of reference of the board. It should detail its responsibilities, duties, composition and operation, within the limits defined by the company's articles of association.* *Guideline The board should be organised in order to perform its tasks efficiently.* *Guideline The company should adapt its governance structure to its evolving needs.* *1.2 The board should decide on the company's values and strategy, its risk appetite and key policies.* *Guideline The board should ensure that the necessary leadership, human and financial resources are in place for the company to meet its objectives.* *Guideline In translating values and strategies into key policies, the board should pay attention to corporate social responsibility, gender diversity and diversity in general.* *1.3 With respect to its monitoring responsibilities, the board should at least:* • *review executive management performance and the realisation of the company's strategy;* • *monitor and review the effectiveness of the board's committees;* • *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;* *Guideline "Timely disclosure" means the disclosure in due time according to the existing legislation and regulations.* • *approve a framework of internal control and risk management set up by the executive management;* *Guideline Such a framework should be clear, define the meaning of 'internal control' and 'risk management' and help the executive management to put internal control and risk management systems in place.* • *review the implementation of this framework, taking into account the review made by the audit committee;* • *supervise the performance of the statutory and/or registered auditor (hereinafter "external auditor") and supervise the internal audit function, taking into account the review made by the audit committee;* • *describe the main features of the company's internal control and risk management systems, to be disclosed in the Corporate Governance Statement (hereinafter "CG Statement").* *1.4 The board should decide on the executive management structure and determine the powers and duties entrusted to the executive management. These should be included in the terms of reference of the board and in those of the executive management.* *1.5 There should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for the running of the company's business. The chairman of the board and the chief executive officer (hereinafter "CEO") should not be the same individual. The division of responsibilities between the chairman and the CEO should be clearly established, set out in writing and agreed by the board.* *1.6 The chairman should establish a close relationship with the CEO, providing support and advice, while fully respecting the executive responsibilities of the CEO.* *1.7 The board should foster - through appropriate measures - an effective dialogue with the shareholders and potential shareholders based on a mutual understanding of objectives and concerns.* *1.8 The board should ensure that its obligations to all shareholders are understood and met. It should account to the shareholders for the discharge of its responsibilities.*

1.1 Topics for change – introduction

The different relationships between a company and its shareholders, managers and directors are subject to **various potential agency issues**. These agency issues arise because the agent who is supposed to make the decision in the best interests of the principal is intrinsically motivated by self-interest, and the agent's own interests may not be aligned with the principal's interests. In addition to the potential misalignment of interests between an agent and a principal, the agent and the principal's risk profiles may also differ.

In a corporate context, these agency issues can arise at different levels.

"Corporate governance provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined"
G20/OECD Principles of Corporate Governance

POTENTIAL AGENCY ISSUES IN A CORPORATE CONTEXT
– Between shareholders (ie the company's owners), a company's managers and/or directors;
– Between the non-executive directors and the (better informed) executive managers; and
– Between controlling and non-controlling shareholders.

One of the basic principles of good governance is that no one individual should have autonomous power over decision-making. There should be 'checks and balances' in place that subject the actions of individuals to scrutiny, while the most important decisions should be taken on a collective basis.[36] In view of managing and mitigating potential agency issues, a clear governance structure should be put in place with defined allocations of powers, defined reporting systems and clear lines of accountability.

In view of protecting shareholders' interests, it is important to align the interests and risk profiles of agents, on the one hand, and principals, on the other, by setting out a clearly defined corporate strategy. To ensure the realisation of a company's objectives, sound business practices should be cultivated within the company and a clear governance structure put in place clearly setting out the tasks and responsibilities of each of the corporate actors.

An area of increasing importance for boards, which is closely related to corporate strategy, is oversight of the company's risk management. This will involve oversight of the accountabilities and responsibilities for managing risks, specifying the types and degree of risk that a company is willing to accept in pursuit of its goals and how it will manage the risks it creates through its operations and relationships. It is thus a crucial guideline for management to manage risks in order to meet the company's desired risk profile.

According to the Committee of Sponsoring Organizations of the Treadway Commission (**COSO**), "*it is the* ***internal control process of a company which is to be designed to provide reasonable assurance regarding the achievement of a company's objectives***:

– operations objectives pertaining to the efficiency of a company's operations (including operational and financial performance goals, and safeguarding assets against loss);
– reporting objectives pertaining to internal and external financial and non-financial reporting and which may encompass reliability, timeliness, transparency, or other terms as set forth by regulators, recognized standard setters, or the company's policies; and
– compliance objectives pertaining to the adherence to laws and regulations to which the company is subject."[37]

1.2 Strategy and risk profile

The board of directors can be considered as the intermediary between the shareholders and management. In fulfilling its role, the board of directors has a fiduciary duty to represent the shareholders' interests. As set out above, in view of protecting shareholders' interests, it is important that the risk profile of the directors/managers of a company (ie the agents) and the risk profile of the

"Organisational nirvana occurs when everyone knows where they are going, the strategy for getting there and then makes that happen"

36 ecoDa, *A Guide to Corporate Governance Practices in the European Union*, 2015, p. 18.
37 COSO, Internal Control – Integrated Framework, Executive Summary, http://www.coso.org/documents/990025p_executive_summary_final_may20_e.pdf

principals (ie the shareholders) are aligned, and that the shareholders are informed of the (realisation of) the company's strategy.

2014 H&S Study, p. 10

France

Provision 3.1 of the French CG Code expressly states that the first mission of the board of directors is to determine the strategic orientation of the company. In accordance with provision 3.2 of the French CG Code, the internal regulations of the company must include the principle that every significant operation not in line with the company's strategy must be subject to prior approval of the board of directors. It is an essential quality of each director to have (i) good assessment skills ("qualité de jugement") in particular in relation to persons, strategies and situations, which is based on their experience, and (ii) anticipation skills ("capacité d'anticipation") allowing each director to identify risks and strategic matters (cf. provision 6.1 of the French CG Code).

The board of directors must ensure that the shareholders and investors receive pertinent, balanced and pedagogical information on the company's strategy (cf. provision 4.2 of the French CG Code).

Germany

In accordance with provision 3.2 of the German CG Code, the management board is to coordinate the company's strategic approach and regularly discuss the state of the strategy implementation with the supervisory board. It shall, comprehensively and without delay, inform the supervisory board of all issues important to the company with regard to, among other things, strategy, risk situations, risk management and compliance and shall point out to the supervisory board where business development deviates from the plans and targets and indicate the reasons for such deviation (cf. provision 3.4). In accordance with provision 5.2 of the German CG Code, in meetings between the supervisory board and the management board, the chairman of the supervisory board shall, regularly consult with the management board, more specifically with its chairman or spokesman, on strategic issues, risk situations, risk management and compliance.

For transactions of fundamental importance, the articles of association or the supervisory board – in the latter case possibly also in individual cases – shall specify, in accordance with provision 3.3 of the German CG Code, which provisions require the approval of the supervisory board. These include decisions or measures that fundamentally change the assets, financial or earnings situations of the company.

Sweden

In accordance with provision 3.1 of the Swedish CG Code, the board of directors is responsible for, among other things, the establishment of the overall goals and strategy of the company and for ensuring that there is an appropriate system for following-up and controlling the company's operations and the risks to the company that are associated with its operations.

The Netherlands

In accordance with best practice provision 1.1.1 of the Dutch CG Code, the management board should develop a view on long-term value creation by the company and its affiliated enterprise and should formulate a strategy in line with this (to which it, depending on market dynamics, may be necessary to make short-term adjustments). The Dutch CG Code further sums up a number of points which the management board should pay attention to when developing the strategy (including but not limited to the strategy's implementation and feasibility; the business model applied by the company, opportunities and risks for the company, etc as well as environmental and social matters).

In accordance with best practice provision 1.2.1 of the Dutch CG Code, the management board is also responsible for identifying and managing the risks associated with the company's strategy and activities: it is responsible for establishing the risk appetite, and also the measures that are put in place in order to counter the risks being taken. Also, when incorporating and maintaining values within the company and its affiliated enterprise, the management board must pay attention to, among other things, the strategy (cf. best practice provision 2.5.1).

In the management report, the management board should give a more detailed explanation of its view on long-term value creation and the strategy for its realisation, as well as describing what contributions were made to long-term value creation in the past financial year. The management board should report on both the short-term and long-term developments (cf. best practice provision 1.1.4 of the Dutch CG Code).

The management board should engage the supervisory board early on in formulating a strategy for realising long-term value creation and it must render account to the supervisory board for the strategy and the explanatory notes to that strategy (cf. best practice provision 1.1.2 of the Dutch CG Code). In accordance with best practice provision 1.1.3 of the Dutch CG Code, the supervisory board should supervise the manner in which the management board implements the long-term value creation strategy and it should regularly discuss the strategy, its implementation and the principal risks associated with it. The supervisory board is to give account in its report of its involvement in the establishment of the strategy and the way in which it monitors its implementation.

United Kingdom

In accordance with section A.1 of the UK CG Code, every company should be headed by an effective board that is collectively responsible for the long-term success of the company. This section A.1 includes the supporting principle, that the board's role is to provide entrepreneurial leadership to the company within a framework of prudent and effective controls which enables risk to be assessed and managed. The board should set the company's strategic aims, ensure that the necessary financial and human resources are in place for the company to meet its objectives and review management performance.

In accordance with main principle C.2 of the UK CG Code, the board is responsible for determining the nature and extent of the principal risks it is willing to take in achieving its strategic objectives. Main principle A.4 requires non-executive directors, as part of their role as members of a unitary board, to constructively challenge and help develop proposals on strategy. It is further expressly stated in provision E.1.1 that the chairman of the board is to discuss governance and strategy with major shareholders.

Since October 2013, certain entities under UK law[38] *must prepare a strategic report as part of their annual report. In June 2014, the FRC issued "Guidance on the Strategic Report" for directors, which is to serve as a best practice statement and encourage entities to prepare a high quality strategic report whose overriding objective is to provide information for shareholders that will enable them to assess how the directors have performed their duty to promote the success of the company.*[39] *In accordance with provision 4.6, the strategic report has three main content-related objectives:*

i) to provide insight into the entity's business model and its main strategy and objectives;

ii) to describe the principal risks the entity faces and how they might affect its future prospects; and

iii) to provide an analysis of the entity's past performance.

In accordance with the guidelines accompanying provision 1.1 of the Belgian CG Code, the board's role should be to pursue the long-term success of the company by providing entrepreneurial leadership and enabling risks to be assessed and managed. In provision 1.2 of the Belgian CG Code, it is further stated that the board should decide on the company's values and strategy, its risk appetite and its key policies. To ensure that the necessary leadership, human and financial resources are in place for the company to meet its objectives, and in translating values and strategies into key policies, the board should pay attention to corporate social responsibility, gender diversity and diversity in general.

Given that the interests and the risk profiles of shareholders may diverge from that of the directors and managers, it is **important that a company's strategy, along with the nature and extent of the risks the board is willing to take to reach the strategic objectives, are clearly formulated** so that everyone is on the same page. In this respect, the UK is a frontrunner by requiring that certain entities subject to UK law prepare a strategic report as part of their annual reporting obligations.

In each of the jurisdictions studied, the **responsibility for establishing and overseeing the company's strategic orientation resides with the board of directors**. More specifically:

- in jurisdictions where the board is structured as a one-tier board (ie France, Sweden, the United Kingdom and Belgium), this responsibility resides with the board of directors; and
- in jurisdictions where the board is structured as a two-tier board (ie Germany and the Netherlands), the management board is responsible for defining the company's strategy and must render account to its supervisory board.

Whereas the strategy-related provisions included in the Belgian 2009 Code are focused on the board's responsibility to define the company's strategy, **we note that in the jurisdictions studied, additional accompanying guidelines are included on this topic which could also be included in the Belgian 2009 Code. Such accompanying guidelines could provide additional reassurance to shareholders on their investee company's strategy**:

- **Communication with shareholders**: under the French CG Code, the board of directors must ensure that the investors receive pertinent, balanced and pedagogical information on the company's strategy, and the UK CG Code requires the chairman of the board to discuss governance and strategy with the company's major shareholders. Furthermore, in accordance with the UK CG Code, directors should state in the annual report that they consider the annual report and accounts, taken as a whole, to be fair, balanced and understandable and provide the information necessary for shareholders to assess the company's position and performance, business model and strategy. They should also include an explanation of the basis on which the company generates or preservers value over the longer

38 Section 414A of the Act requires all companies that are not small in accordance with Section 414B of the Act to prepare a strategic report.
39 Section 172 of the UK Companies Act 2006.

term (the business model) and the strategy for delivering the objectives of the company. In accordance with the Dutch CG Code, the management board should give a more detailed explanation of its view on long-term value creation and the strategy for its realisation in its management report, as well as describing what contributions were made to long-term value creation in the past financial year.

- **Review and, as the case may be, adjust the company's strategy**: under the Dutch CG Code, the supervisory board should regularly discuss the strategy, its implementation and the principal risks associated with it. It is the management board's responsibility to make short-term adjustments to the company's strategy, depending on market dynamics.
- **Strategy - quality requirements**: in the Dutch CG Code, the Dutch CG Committee sets out in a best practice provision that certain aspects are to be taken into account by the management board when developing the company's strategy.
- **Quality of directors**: the French CG Code expressly states that it is an essential quality that each director has (i) good assessment skills ("*qualité de jugement*") in particular in relation to persons, strategies and situations which is based on the director's experience and (ii) anticipation skills ("*capacité d'anticipation*") allowing the director to identify risks and strategic matters.

1.3 Internal control systems and risk management

As set out above, companies set themselves strategic and business objectives. In view of the actual realisation of such objectives, it is important that risks potentially threatening their achievement are properly managed. It is the internal control system of a company that is designed to provide reasonable assurance of the achievement of objectives of the company. However, it is to be noted that the internal control system can only provide a reasonable degree of assurance as to the realisation of these objectives. There are inherent limitations to the internal control systems (eg assessment errors, human shortcomings, etc) and, when shaping the internal control system, the costs and benefits will have to be assessed.

The board of directors does not have sole responsibility for the company's system of internal control. All employees are accountable for implementing the policies on risk and control. This reflects the 'top down, bottom-up' nature of a sound system of internal control; however, the board retains final responsibility for overseeing the company's internal control and risk management systems and for ensuring the integrity of the reporting systems.[40]

France

Provision 4.3 of the French CG Code requires that each listed company is equipped with reliable procedures for the identification, control and evaluation of its commitments and risks, and that it provides shareholders and investors with relevant information in this area. For such purposes:

- *the annual report should specify the internal procedures set up to identify and control off-balance-sheet commitments and to evaluate the corporation's material risks; and*
- *each company must publish the company's ratings by financial rating agencies as well as any changes that have occurred during the financial year.*

In the framework of following up on the efficiency of the internal control and risk management systems and, as the case may be, the internal audit of the procedures relating to the setting up and treatment of accounting and financial information, the audit committee hears those responsible for internal audit and risk control and renders its advice on the organisation of their services. It should be informed of the internal audit programme and it should be a beneficiary of the internal audit reports or a periodic summary of these reports.

The audit committee shall also examine the risks and the material off-balance-sheet commitments, assess the importance of any failures or weaknesses which are communicated to it and, if necessary, inform the board of directors thereof.

Germany

The management board is to ensure that an appropriate compliance management system is set up, reflecting the specific risks of the enterprise (cf. provision 4.1.3 of the German CG Code).

40 The KPMG Review, Internal Control: A Practical Guide, 1999, accessible through http://www.ecgi.org/codes/documents/kpmg_internal_control_practical_guide.pdf

The supervisory board in turn is, in accordance with provision 5.3.2 of the German CG Code, responsible for setting up an audit committee which (insofar as no other committee is entrusted with this work) handles the effectiveness of the internal control and risk management systems.

Sweden

In accordance with rules 7.3 to 7.6 of the Swedish CG Code, the board of directors is to ensure that the company has good internal controls and formalised routines in place to ensure that approved principles for financial reporting and internal controls are applied, and that the company's financial reports are produced in accordance with legislation, applicable accounting standards and other requirements for listed companies.

For companies that do not have a separate internal audit function, the board of directors is to evaluate the need for such a function annually and to explain its decision regarding internal controls in the company's corporate governance report. The description of the company's internal controls included in the corporate governance report is also to include the board's measures for monitoring that the internal controls related to financial reports and reporting to the board function adequately. At least once a year, the board is to meet the company's statutory auditor without the chief executive officer or any other member of the executive management present.

In accordance with rule 10.2 of the Swedish CG Code, together with the information required by legislation,[41] *a description of internal controls in accordance with paragraph 3 of rule 7.3 and with rule 7.4 of the Swedish CG Code is to be included in the corporate governance report of the company (if this is not presented in its annual report).*

The Netherlands

In the Dutch CG Code, risk management plays a central role. Inspiration was sought in the corporate governance codes of other European countries (including the United Kingdom) and the FRC's Guidance on Risk Management, Internal Control and Related Financial and Business Reporting.

*In accordance with principle 1.2 of the Dutch CG Code, the company should have adequate internal risk management and control systems in place. The **different phases of risk assessment** are described in more detail in best practice provisions 1.2.1 to 1.2.3:*

- *Risk assessment: The management board should identify and analyse the risks associated with the company's strategy and activities. It should establish the risk appetite within which the company may accept risks and the control measures to counter those risks.*
- *Implementation: based on the risk assessment, the management board should design, implement and maintain adequate internal risk management and control systems. To the extent relevant, these systems should be integrated into the work processes within the company and its affiliated enterprises, and should be familiar to those who use them.*
- *Monitoring of effectiveness: The management board should monitor the operation of the internal risk management and control systems and, at least annually, carry out a systematic review of the effectiveness of the systems' design and operation. Such monitoring should cover all material control measures, including the financial, operational and compliance aspects, and take account of weaknesses observed and lessons learned, signals from whistle-blowers and findings from the internal audit function and the external auditor. Where necessary, improvements should be made to internal risk management and control systems.*

*The **position of the internal audit function** has also been solidified in the Dutch CG Code. In accordance with principle 1.3, the duty of the internal audit function is to assess the design and the operation of the internal risk management and control systems. The management board is responsible for the internal audit function. The supervisory board oversees the internal audit function and maintains regular contact with the person fulfilling this function. This principle is supported by the following best practice provisions:*

- *The management board both appoints and dismisses the senior internal auditor. Both the appointment and the dismissal of the senior internal auditor should be submitted to the supervisory board for approval, along with the recommendation issued by the audit committee.*
- *The management board should assess the way in which the internal audit function fulfils its responsibility annually, taking into account the audit committee's opinion.*
- *The internal audit function should draw up an audit plan, involving the management board, the audit committee and the external auditor in this process. The audit plan should be submitted to the management board, and then to the supervisory board, for approval. In this internal audit plan, attention should be paid to the interaction with the external auditor.*
- *The internal audit function should have sufficient resources to execute the internal audit plan and have access to information that is important for the performance of its work. The internal audit function should have direct access to the audit committee and the external auditor. Records should be kept of how the audit committee is informed by the internal audit function.*

[41] The information to be included in the corporate governance report is stipulated in chapter 6, section 6 of the Swedish Annual Accounts Act (1995:1554).

- *The internal audit function should report its audit results to the management board and the essence of its audit results to the audit committee, and should inform the external auditor. The research findings of the internal audit function should, at least, include the following: (i) any flaws in the effectiveness of the internal risk management and control systems; (ii) any findings and observations having a material impact on the risk profile of the company and its affiliated enterprise; and (iii) any failings in the follow-up of recommendations made by the internal audit function.*

It is further specified that, if there is no separate department for the internal audit function, the supervisory board will assess annually whether adequate alternative measures have been taken, partly on the basis of a recommendation issued by the audit committee, and will consider whether it is necessary to establish an internal audit department. The supervisory board should include the conclusions, along with any resulting recommendations and alternative measures, in the supervisory board's report.

In addition to a principle dedicated to risk management and a principle dedicated to the internal audit function, a separate principle is dedicated to ***risk management accountability*** *according to which the management board should render account of the effectiveness of the design and the operation of the internal risk management and control systems:*

- *The management board should discuss the effectiveness of the design and operation of the internal risk management and control systems with the audit committee, and render account of this to the supervisory board.*
- *Clear guidance is given as to where the management board is to render account of in the management report (ie the execution of the risk assessment, with a description of the principal risks facing the company in relation to its risk appetite; the design and operation of the internal risk management and control systems during the past financial year; any major failings in the internal risk management and control systems that have been observed in the past financial year, any significant changes made to these systems and any major improvements planned along with a confirmation that these issues have been discussed with the audit committee and the supervisory board; and the sensitivity of the results of the company to material changes in external factors)*
- *In its management report, the management board should state (with clear substantiation) that: (i) the report provides sufficient insights into any failings in the effectiveness of the internal risk management and control systems; (ii) the aforementioned systems provide reasonable assurance that the financial reporting does not contain any material inaccuracies; (iii) based on the current state of affairs, it is justified that the financial reporting is prepared on a going concern basis; and (iv) the report includes those material risks and uncertainties that are relevant to the expectation of the company's continuity for the period of twelve months after the preparation of the report.*

United Kingdom

In accordance with main principle C.2 of the UK CG Code, the board should maintain sound risk management and internal control systems.

Principle C.2.1 of the UK CG Code further states that the directors should confirm in the annual report that they have carried out a robust assessment of the principal risks facing the company, including those that would threaten its business model, future performance, solvency or liquidity. The directors should describe those risks and explain how they are being managed or mitigated.

Taking into account the company's current position and principal risks, the directors should, in accordance with principle C.2.2 of the UK CG Code, explain in the annual report how they have assessed the prospects of the company, the period in which they have done so and why they consider that period to be appropriate. The directors should state whether they have a reasonable expectation that the company will be able to continue operating and meeting its liabilities as they fall due over the period of their assessment, drawing attention to any qualifications or assumptions as necessary.[42]

Pursuant to provision C.2.3, the board should monitor the company's risk management and internal control systems and, at least annually, carry out a review of their effectiveness, and report on that review in the annual report.[43] *The monitoring and review should cover all material controls, including financial, operational and compliance controls.*

In accordance with main principle C.3 of the UK CG Code, the board of directors should establish formal and transparent arrangements for considering how they should apply the corporate reporting and risk management and internal control principles and for maintaining an appropriate relationship with the company's auditors. The main role and responsibilities of the audit committee should be set out in written terms of reference and should include, among other things, reviewing the company's internal financial controls and, unless expressly addressed by a separate board risk committee composed of independent directors or by the board itself, reviewing the company's internal control and risk management systems.

Further, it should be noted that in September 2014 the FRC issued Guidance on Risk Management, Internal Control and Related Financial and Business Reporting[44] *aimed at providing a high-level overview of some of the factors boards should consider in relation to the design,*

42 This provision overlaps with FCA Rules LR 9.8.6 (3) R (see Schedule B).
43 In addition, FCA Rule DTR 7.2.5 R requires that companies describe the main features of the internal control and risk management systems in relation to the financial reporting process.
44 https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Guidance-on-Risk-Management,-Internal-Control-and.pdf

implementation, monitoring and review of the risk management and internal control systems. This guidance aims at: bringing together the elements of best practice for risk management; prompting boards to consider how to discharge their responsibilities in relation to the existing and emerging principal risks faced by the company; reflecting sound business practice whereby risk management and internal control are embedded in the business process by which a company pursues its objectives; and highlighting reporting responsibilities.

Provision 1.3 of the Belgian 2009 Code requires that the board of directors approves an internal control and risk management framework that is to be set up by the executive management. A guideline specifies that such a framework should be clear, define the meaning of internal control and risk management and help the executive management to put internal control and risk management systems in place. In accordance with best practice provision 6.5 of the Belgian 2009 Code, the executive management of a company must put in place internal controls (ie systems to identify, assess, manage and monitor financial and other risks), without prejudice to the monitoring role of the board of directors, based on the framework approved by the board.

All newly appointed directors should receive an appropriate induction to ensure their swift contribution to the board. Such induction process should help the director to grasp the fundamentals of the company, including but not limited to risk management and internal control systems (cf. provision 4.8 and the accompanying guideline of the Belgian 2009 Code). For new audit committee members, this programme should provide an overview of the company's internal control organisation and risk management systems (cf. provision 4.9 and the accompanying guideline of the Belgian 2009 Code).

The audit committee is to monitor the effectiveness of the company's internal control and risk management systems (without prejudice to the legal responsibilities of the board).[45]

The monitoring of the effectiveness of the company's internal control and risk management systems set up by the executive management should be done at least annually, 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.[46] The audit committee should also review the statements included in the corporate governance statement on internal control and risk management.[47]

Without prejudice to the legal provisions that require that the statutory auditor provides reports or warnings to the administrative bodies of the company, the external auditor must report to the audit committee on the key matters arising from the statutory audit of the annual accounts and in particular on material weaknesses in internal control in relation to the financial reporting process.[48] At least twice a year, the audit committee should meet the external and internal auditors to discuss matters relating to its terms of reference and any issues arising from the audit process, and in particular any material weaknesses in the internal control.

In accordance with provision 1.3 of the Belgian 2009 Code, the corporate governance statement should include a description of the main features of the company's internal control and risk management systems. The Belgian CGC has developed a guidance document (*hulpdocument/document d'aide*) describing the main features of the company's internal control and risk management systems[49] and a guidance document providing assistance to listed companies in applying the legal dispositions and the provisions of the Belgian 2009 Code on internal control and risk management.[50]

All of the corporate governance codes of the studied jurisdictions include provisions on internal control and risk management (systems). **In the Belgian 2009 Code and the Company Law, a substantive number of provisions on internal control and risk (management) systems are already included**. In addition, the CGC has issued two guidance documents (one describing the main features of the company's internal control and risk management systems and one on assistance to listed companies in applying the relevant legal dispositions and the provisions of the Belgian 2009 Code).

Whereas the Belgian 2009 Code, in combination with the Company Law, is considered well positioned in the field of risk management and internal control (systems), **the information to be included in the annual report (or corporate governance statement) is a point that could be elaborated on when next revising the Belgian 2009 Code**.

In accordance with article 96 §1, 1° of the Company Law, the annual report must describe the primary risks and uncertainties that the company is confronted with and, in accordance with article 96, §2, 3° of the Company Law, the

45 Article 526bis Company Law and 5.2/6 Appendix C *Audit Committee* to the Belgian 2009 Code.
46 5.2/14 Appendix C *Audit Committee* to the Belgian 2009 Code.
47 5.2/15 Appendix C *Audit Committee* to the Belgian 2009 Code.
48 Article 526bis, §5 Company Law.
49 http://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/2012_03_20_richtlijnen_ic_0.pdf
50 http://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/2011_01_10_interne_controle_nldoc.pdf

corporate governance statement must describe the most important characteristics of the internal control and risk management systems of the company in relation to financial reporting.

When compared to the corporate governance codes of those jurisdictions studied, the information to be included in the annual report or the corporate governance statement is rather limited:

- In the United Kingdom, the board of directors is required to confirm in the annual report that they have carried out **a robust assessment of the principal risks facing the company**, including those that would threaten its business model, future performance, solvency or liquidity and **describe those risks and explain how they are being managed or mitigated**. In addition, the board of directors must report on their review of the risk management and internal control systems of the company, covering all material controls, including financial, operational and compliance controls.[51] Directors must also state whether they have a reasonable expectation that the company will be able to continue in operation and meet its liabilities as they fall due over the period of their assessment, drawing attention to any qualifications or assumptions as necessary. Furthermore, in the annual and half-yearly financial statements, the directors should state whether they considered it appropriate to adopt the going concern basis of accounting in preparing them. In the Dutch CG Code, the management board should include a statement in its report that the report includes those material risks and uncertainties that are relevant to the expectation of the company's continuity for a period of twelve months after the preparation of the report.
- In the Netherlands, the Dutch CG Code requires the management board, in its report, to render account of: (i) the execution of the risk assessment, with a description of the principal risks facing the company in relation to its risk appetite; (ii) the design and operation of the internal risk management and control systems during the past financial year; (iii) any major failings in the internal risk management and control systems which have been observed in the past financial year; (iv) any significant changes made to these systems and any major improvements planned, along with a confirmation that these issues have been discussed with the audit committee and the supervisory board; and (v) the sensitivity of the results of the company to material changes in external factors. The management board should also state (with clear substantiation) in its report that: (a) the report provides sufficient insight into any failings in the effectiveness of the internal risk management and control systems; (b) the aforementioned systems provide reasonable assurance that the financial reporting does not contain any material inaccuracies; (c) based on the current state of affairs, it is justified that the financial reporting is prepared on a going concern basis; and (d) it contains those material risks and uncertainties that are relevant to the expectation of the company's continuity for a period of twelve months after the preparation of the report.

51 The FRC has issued further guidance as to what this statement should contain (Guidance on Risk Management, Internal Control and Related Financial and Business Reporting).

2. Principle 2: The company shall have an effective and efficient board that makes decisions in the corporate interest

CURRENT TEXT OF THE BELGIAN 2009 CODE
2.1 The board's composition should ensure that decisions are made in the corporate interest. It should be determined on the basis of gender diversity and diversity in general, as well as complementary skills, experience and knowledge. A list of the members of the board should be disclosed in the CG Statement. *Guideline The board should be small enough for efficient decision-making. It should be large enough for its members to contribute experience and knowledge from different fields and for changes to the board's composition to be managed without undue disruption.* *2.2 No individual or group of directors should dominate the board's decision-making. No one individual should have unfettered powers of decision-making.* *2.3 At least one half of the board should comprise non-executive directors and at least three of them should be independent according to the criteria set out in Appendix A.* *Guideline A non-executive director is any member of the board who has no executive responsibilities in the company.* *2.4 The list of the members of the board, disclosed in its CG Statement, should indicate which directors are independent.* *An independent director who ceases to satisfy the requirements of independence should immediately inform the board.* *2.5 The chairman is responsible for the leadership of the board. He should take the necessary measures to develop a climate of trust within the board, contributing to open discussion, constructive dissent and support for the board's decisions.* *Guideline The chairman should promote effective interaction between the board and the executive management.* *Guideline The board may entrust the chairman with other specific responsibilities.* *2.6 The chairman sets the agenda of the board meetings, after consultation with the CEO, and ensures that procedures relating to preparatory work, deliberations, passing of resolutions and implementation of decisions are properly followed. The minutes of the meeting should sum up the discussions, specify any decisions taken and state any reservations voiced by directors.* *Guideline The agenda should list the topics to be discussed and specify whether they are for information, for deliberation or for decision-making purposes.* *2.7 The chairman 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 board information.* *Guideline The chairman should ensure that all directors can make a knowledgeable and informed contribution to board discussions and that there is sufficient time for consideration and discussion before decision-making.* *Guideline Directors should have access to independent professional advice at the company's expense, subject to compliance with the relevant procedure laid down by the board.* *2.8 The board should meet sufficiently regularly to discharge its duties effectively. The number of board and board committee meetings and the individual attendance record of directors should be disclosed in the CG Statement.* *Guideline The company should consider organising - where necessary - board and committee meetings using video, telephone or internet-based means.* *2.9 The board should appoint a company secretary to advise the board on all governance matters. Where necessary, the company secretary should be assisted by the company lawyer. Individual directors should have access to the company secretary.* *Guideline The role of the company secretary should include ensuring, under the direction of the chairman, good information flow within the board and its committees and between the executive management and non-executive directors, as well as facilitating induction and assisting with professional development as required. The company secretary should regularly report to the board, under the direction of the chairman, on how board procedures, rules and regulations are being followed and complied with. The terms of reference of the board should describe the role and tasks of the company secretary.*

2.1 Topics for change – introduction

Principle 2 of the Belgian 2009 Code requires that companies have an effective and efficient board that makes decisions in the corporate interest. In order to have an effective and efficient board that avoids "groupthink" and stimulates decision-making in the interests of the company, it is considered important to attract board members with a diverse set of skills and various backgrounds. A **balanced and diverse board** is key.

In addition to having a balanced and diverse board, the board should be able to **exercise objective independent judgement with regards to the company's affairs**. This is essential in order for the board to exercise its duties (including, but not limited to, the monitoring of managerial performance, the prevention of conflicts of interests and the balancing of competing demands).

In countries where the corporate landscape is characterised by companies with a one-tier board (such as Belgium), the OECD regards it as good practice to separate the role of chief executive officer and chairman of the board, in view of strengthening the objectivity of the board and its independence from management. The OECD also regards the designation of a **lead director as a good practice alternative** in some jurisdictions if that role is defined with sufficient authority to lead the board in cases where management has a conflicting interest. Such mechanisms can help to ensure high quality company governance and effective functioning of the board. The OECD further notes that in some jurisdictions the chairman or lead director receives support from a company secretary.[52]

In view of having an effective and efficient board that makes decisions in the company's corporate interest, it is also key that board members are able to **commit themselves effectively** to their responsibilities. According to the OECD, achieving legitimacy can be facilitated by the publication of attendance records of individual board members (eg whether they have missed a significant number of meetings) and any other work undertaken on behalf of the board and the associated remuneration.

2.2 Board composition - balanced and diverse

(a) A balanced board

One of the essential characteristics of an effective and efficient board is that it is a **balanced board**. In 2010, ecoDa published a list of governance principles, the aim of which was to help boards achieve more balance (reflecting the size and composition of the company's activities).[53]

GOOD PRACTICE ECODA PRINCIPLES FOR BOARD COMPOSITION AND PRACTICES
– The board should not be so large as to be unwieldy. The balance of skills and experience should be appropriate for the requirements of the business. Changes to the board's composition should be manageable without undue disruption.
– There should be a specific procedure for the appointment of new directors to the board. Appointments to the board should be made after careful examination using objective criteria.
– The board should satisfy itself that plans are in place for the orderly succession of appointments to the board and to senior management. The aim is to maintain an appropriate balance of skills and experience within the company and on the board.
– The period of appointment of directors should be carefully considered. The board should balance the flexibility of open-ended appointments against the need to ensure the planned and progressive reconstitution of the board.

52 G20/OECD Principles of Corporate Governance, p. 53-54.
53 ecoDa, *Corporate Governance Guide for Unlisted Companies in Europe*, p. 31.

(b) A diverse board

"The selection of the right people for the board is increasingly critical. Diversity of thought is the key."
2014 H&S Study, p. 7

In recent years, there has been **a growing focus on board diversity**. Greater diversity in directors' backgrounds, skills and experiences may enhance board effectiveness by bringing a wider range of perspectives and knowledge to bear on issues concerning company performance, strategy and risk. Improving diversity of thought among board members should reduce the risk of "groupthink", where views go unchallenged. Advocates of board diversity are of the opinion that, for too long now the board has been composed of "male, frail, pale and stale" members, and that an increase in diversity should be high on the agenda of European companies.[54]

The 2014 H&S Study survey indicated that **board members support diversity**:

– 97% of the directors of European-listed companies believe that it is important for a board to have the right balance of skills, knowledge and experience necessary to constructively challenge senior management.

– 63% of the directors of European-listed companies believe it is important to have a diverse gender and nationality mix in a board of directors.[55]

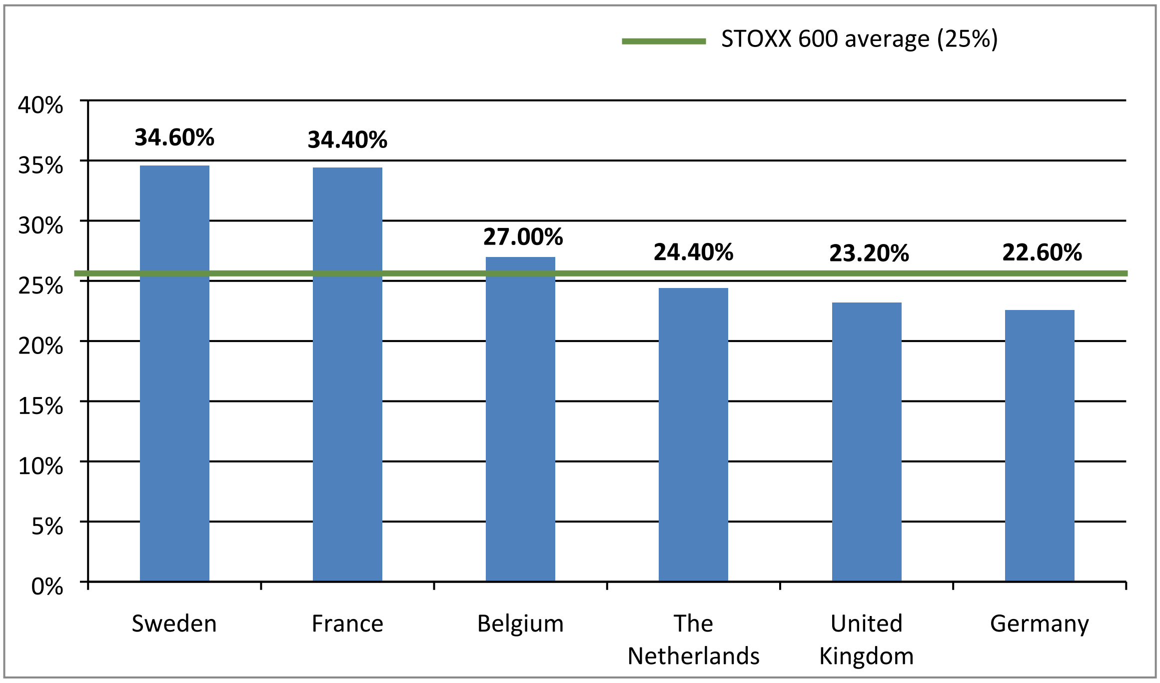
These board members have been joined by the European Parliament and the Council in supporting board diversity. In 2014, the European Parliament and the Council adopted **the Diversity Directive** which states that **large undertakings** (ie public-interest entities exceeding, on their balance sheet dates, the average number of 500 employees during the financial year), among others, **should include in their annual corporate governance statement a description of the diversity policy applied in relation to their administrative, management and supervisory bodies** with regard to aspects such as, for instance, age, gender, or educational and professional backgrounds, the objectives of that diversity policy, how it has been implemented and the results in the reporting period. If no such policy is applied, the statement must contain an explanation as to why this is the case.

On 15 January 2016, in preparation of providing non-binding guidelines on the methodology for reporting non-financial information (including on diversity), the EC launched a consultation document to collect information from and the views of stakeholders on the current guidance for the reporting of non-financial information by companies across all sectors.[56]

The diversity debate has mainly focused on **gender diversity** in recent years. According to ecoDa and the International Financial Corporation's Guide to Corporate Governance Practices in the European Union (the **2015 ecoDa/IFC Guide**),[57] a growing body of research has shown that gender diversity is, among other things, positively associated with improved corporate governance and ethics, financial performance and shareholder value, improved board performance and core values and risk attitude, and moreover, that there is a clear public demand to have more women represented in top business jobs.[58]

According to the study "*Gender Diversity on European Boards – Realizing Europe's Potential: Progress and Challenges*" carried out in April 2015 by European Women on Boards in partnership with ISS (the **EWB/ISS Study**), **there has been a clear trend of increasing the number of women on European boards over the past five years**. Nevertheless, substantial differences remain between the average percentage of women on boards in the market, with the highest percentage of women on boards being Norway at 38.7% and the lowest, Switzerland, at 16.1%. Of the jurisdictions studied, companies in Sweden, France and Belgium have levels of female board membership above the 25% European average, whereas the Netherlands, the United Kingdom and Germany have levels of female board membership below the European average.

54 ecoDa, *A Guide to Corporate Governance Practices in the European Union*, 2015, p. 44.
55 2014 H&S Study, p. 34.
56 Consultation document, Non-binding guidelines for reporting of non-financial information by companies 2016, p 2. The results of such consultation are available at https://ec.europa.eu/eusurvey/publication/non-financial-reporting-guidelines-2016?language=en
57 http://www.ifc.org/wps/wcm/connect/c44d6d0047b7597bb7d9f7299ede9589/CG_Practices_in_EU_Guide.pdf?MOD=AJPERES
58 2015 ecoDa/IFC Guide, p. 44-46.



** Source: EWB/ISS Study, p. 18.*

The Guberna and VBO 2014 Report[59] revealed that in 2014 in Belgium:

– there was, on average, one woman present on the board of directors of listed companies (with a minimum of zero and a maximum of seven); and

– 25% of the Belgian listed companies had no female representation on their boards of directors; 52% of the Belgian listed companies had one to two women on their boards of directors and 23% had three or more women represented on their boards of directors.

Beyond the mere diversity disclosure requirements (as set out in the Diversity Directive), on 14 November 2012, the EC submitted to the European Parliament and the Council the Gender Balance Proposal.[60] The purpose of the proposal was to "*substantially increase the number of women on corporate boards throughout the EU by setting a minimum objective of a 40% presence of the underrepresented sex among the non-executive directors of companies listed on stock exchanges and by requiring companies with a lower share of the under-represented sex among the non-executive directors to introduce pre-established, clear, neutrally formulated and unambiguous criteria in selection procedures for those positions in order to attain that objective*".[61] In 2012, the EC launched a consultation in this respect.

In the absence of European harmonisation, many European countries, including Belgium, Germany, France and Italy, have already **introduced quotas for gender representation into their hard law**. In the Netherlands, companies should, in accordance with the Dutch Civil Code, aim at a gender diversity of 30% (without any consequences for the company in case such aim would not be achieved by ut).

Given that the Company Law contains specific quota and disclosure requirements on gender diversity, one might expect an increased focus on other types of diversity that are currently not incorporated in Belgian hard law, such as experience, knowledge, nationality and age. Introducing sufficient age and nationality diversity within the board of directors of listed companies will presumably depend on the company's culture and business.

France

In accordance with provision 6.2 of the French CG Code, each board should consider what would be the desirable balance of its members and within that of the committees it has established, in particular as regards diversity (the representation of men and women, nationalities, international experiences, expertise, etc). It should publish in the annual report the objectives, the modalities and the results of its policies in these matters.

59 Guberna and Het Verbond van Belgische Ondernemingen (VBO), Onderzoeksrapport Naleving van de Belgische Corporate Governance Code 2009 bij de Bel 20, Bel Mid en Bel Small ondernemingen. Jaarverslagen 2014.
60 COM(2012)614.
61 COM(2012)614, p.5.

The nomination committee is responsible for making propositions to the board of directors after having reviewed in detail all elements in its deliberation, more specifically in view of the composition and the evolution of the shareholding of the company, to come to a balanced composition of the board of directors: taking into account representation between men and women, nationality; international experiences; expertise, etc.

Germany

When filling managerial positions in the enterprise, the management board shall, in accordance with provision 4.1.5 of the German CG Code, take diversity into consideration and, in particular, aim for an appropriate consideration of women. The management board is to set targets for increasing the share of women for the two management levels below the management board.

In accordance with provision 5.1.2 of the German CG Code, the supervisory board is also to respect diversity when appointing management board members. The supervisory board shall determine targets in terms of the share of women on the management board.

The supervisory board shall be composed in such a way that its members as a group possess the knowledge, ability and expert experience required to properly complete its tasks. The supervisory board shall specify concrete objectives regarding its composition which, whilst considering the specifics of the enterprise, take into account the international activities of the enterprise, potential conflicts of interests, the number of independent supervisory board members within the meaning of provision 5.4.2, an age limit to be specified and a regular limit of length of membership to be specified for the members of the supervisory board as well as diversity. In listed companies, where the Codetermination Act, the Codetermination Act for the Iron and Steel Industry or the Codetermination Extension Act apply, the supervisory board shall comprise at least 30 per cent women and at least 30 per cent men. In the other companies covered by the Equality Act, the supervisory board shall determine targets for the share of women. Recommendations by the supervisory board to the competent election bodies shall take these objectives into account. The concrete objectives of the supervisory board and the status of the implementation shall be published in the corporate governance report.

Sweden

The Swedish CG Code is relatively brief on diversity. It merely requires that the board members elected by the shareholders' meeting collectively exhibit diversity and breadth of qualifications, experience and background, and requires that the company strive for gender balance on the board.[62] *Additionally, at a shareholders' meeting, where the election of board members or auditors is to be held, the nomination committee is to present and explain its proposals with regard to the requirements concerning the composition of the board contained in rule 4.1 of the Swedish CG Code. The nomination committee is to provide a specific explanation of its proposals with respect to the requirement to strive for gender balance contained in rule 4.1 of the Swedish CG Code.*

The Netherlands

In accordance with principle 2.1.5 of the Dutch CG Code, the supervisory board is responsible for drawing up a diversity policy for the composition of the management board, the supervisory board and, if applicable, the executive committee. The policy should address the concrete targets relating to diversity and the diversity aspects relevant to the company, such as nationality, age, gender, education and work background. The Dutch CG Code goes further than the Diversity Directive as it stipulates that companies must explain what measures have been and will be taken in the event that the diversity policy's objectives are not achieved. In addition, the scope of the Diversity Directive is limited to large companies, while the Dutch CG Code is applicable to all companies.

The Dutch CG Code further emphasises the importance of the company's transparency regarding its diversity policy. In the corporate governance statement, an explanation should be included on the diversity policy and the way it is implemented in practice, addressing: (i) the policy objectives; (ii) how the policy has been implemented; and (iii) the results of the policy in the past financial year. If the composition of the management board and the supervisory board diverges from the targets stipulated in the company's diversity policy and/or the statutory target for the male/female ratio, if and to the extent that this is provided for under or pursuant to the law, this should be outlined in the corporate governance statement, along with an explanation as to what measures are being taken to attain the intended target, and by when this is likely to be achieved (cf. best practice provision 2.1.6 of the Dutch CG Code).

The Dutch CG Code also requires the supervisory board to ensure that a formal and transparent procedure is in place for the appointment and reappointment of management board and supervisory board members, as well as a sound plan for the succession of management board and supervisory board members, with due regard to the diversity policy (cf. principle 2 of the Dutch CG Code).

In accordance with best practice provision 2.2.1, the diversity objectives from best practice provision 2.1.5 (see above) should be considered in the preparation of the appointment or reappointment of a management board member.

In accordance with best practice provision 2.2.4, the supervisory board should ensure that the company has a sound plan in place for the succession of management board and supervisory board members that is aimed at retaining the balance in requisite expertise, experience and

[62] Rule 4.1 of the Swedish CG Code.

diversity. Due regard should be given to the profile referred to in best practice provision 2.1.1 in drawing up the plan for supervisory board members.

United Kingdom

In accordance with principle B.2 of the UK CG Code, the search for board candidates should be conducted, and appointments made, on merit, against objective criteria and with due regard for the benefits of diversity on the board, including gender. The board should satisfy itself that plans are in place for the orderly succession of appointments to the board and to senior management, so as to maintain an appropriate balance of skills and experience within the company and on the board, and to ensure progressive refreshing of the board.

In the UK, it is the nomination committee that should evaluate the balance of skills, experience, independence and knowledge on the board and, in light of this evaluation, prepare a description of the role and capabilities required for a particular appointment (B.2.2). A separate section of the annual report should describe the work of the nomination committee, including the process it has used in relation to board appointments. This section should include a description of the board's policy on diversity, including gender, any measurable objectives that it has set for implementing the policy, and progress on achieving the objectives.

In accordance with the supporting principle to main principle B.6 of the UK CG Code, any evaluation of the board should consider the balance of skills, experience, independence and knowledge of the company on the board, its diversity, including gender, how the board works together as a unit, and other factors relevant to its competency.

In accordance with principle 2 of the Belgian 2009 Code, the board's composition should be determined on the basis of gender diversity and diversity in general, as well as complementary skills, experience and knowledge. Specific gender diversity rules were introduced in articles 96, §2, 6° and 518 of the Company Law by the law of 28 July 2011.[63] Pursuant to the law of 28 July 2011, at least one third of the board members of publicly-listed and state-owned companies must be of the opposite gender to the other board members. In addition, the law also introduced a disclosure requirement in relation to the company's efforts to ensure that at least one-third of the members of the board of directors are of the opposite gender.

The law applies to state enterprises as from the financial year following the adoption of the law (ie 2012), however, the amendments to the Company Law (ie in articles 96, §2, paragraph 1 and 518bis) are applicable to listed companies after an implementation period ranging from six to eight years, depending on the size of the company which is measured by several criteria (ie the number of employees, the total annual balance sheet and annual turnover). This ensures that the amendments will be fully applicable by 2019.

If the quota is not fulfilled, article 518bis of the Company Law requires that a person of the minority gender must be appointed to any vacant position, and that any appointment not complying with this provision will be null and void. In relation to listed companies, article 518bis of the Company Law imposes a specific sanction consisting of the suspension of any advantage, financial or otherwise, attached to the mandate of directors for all the members of the board as long as the composition of the board does not comply with the quota requirements.[64] It should be noted that only non-executive directors are remunerated for the fulfilment of their role on the board.

Furthermore, the law of 28 July 2011 amending article 96, §2, °6 of the Company Law states that the corporate governance report should provide an overview of the efforts made to ensure that at least one-third of the members of the board of directors is of the opposite gender, in comparison to the other board members. The corporate governance report must provide an overview of the composition and the operations of the governing bodies and their committees.

All jurisdictions studied encourage diversity on the board of directors, albeit to a different extent, and list (possible) elements of diversity, including gender, nationality, age, culture, etc.

The majority of the jurisdictions studied, including Belgium, impose a specific hard law gender quota. Germany, for example, also expressly includes this specific quota in its national corporate governance code, whereas Belgium and the Netherlands do not.

All corporate governance codes of the jurisdictions studied apply their diversity policies to the board of directors (one-tier structure), or the supervisory board and the management board (two-tier structure).

Most jurisdictions studied already legally require the disclosure of the diversity policy in the annual corporate

63 Law of 28 July 2011 modifying the law of 21 March 1991 on the reform of certain public economic enterprises, the Company Code and the law of 19 April 2002 concerning the rationalisation of the functioning and management of the National Lottery aiming to guarantee the presence of women on the boards of autonomous public enterprises, listed companies and the National Lottery, *BS* 14 September 2011.

64 EC, *Women in economic decision-making in the EU: Progress report 2012*, p. 17.

governance statement (cf. the Diversity Directive) and several jurisdictions studies also require the disclosure of the efforts made to reach the diversity targets. Germany, France and the United Kingdom have also expressly incorporated this disclosure requirement into their national corporate governance code.

Considering that the Belgian corporate governance framework (both soft law and hard law) on the topic of gender diversity seems to be **quite well positioned**, the question arises whether there is a need to also expressly insert the gender diversity quota and disclosure requirements in the Belgian 2009 Code. **Instead, it might be more useful to avoid any overlap with current legislation and to shift the focus to other diversity topics, such as experience, knowledge, nationality and age.**

2.3 Independent directors

According to the EC Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (the **2005 Remuneration Recommendation**),[65] the presence of independent representatives on the board, capable of challenging the decisions of management, is widely considered as a means of protecting the interests of shareholders and other stakeholders. In companies with a dispersed ownership, the primary concern is how to make managers accountable to inactive shareholders. In companies with controlling shareholders, the focus is more on how to ensure that the company will be run in a way that sufficiently takes into account the interests of minority shareholders. Ensuring adequate protection for third parties is relevant in both cases. Whatever the formal board structure of a company, the management function should be subject to an effective and sufficiently independent supervisory function.[66]

Therefore, the 2005 Remuneration Recommendation recommends that the administrative, managerial and supervisory bodies, taken as a whole, should include an appropriate balance of executive/managing and non-executive/supervisory directors so that no individual or small group of individuals is able to dominate the decision-making process on these bodies. Consequently, a sufficient number of independent directors should be elected to the (supervisory) board of companies to ensure that any material conflict of interests involving directors will be properly dealt with.[67]

In view of the different legal systems of the EU member states, the EC does not consider it necessary to define an exact number or proportion of independent (supervisory) board members at EU level.[68] However, the EC did define **a set of criteria for determining independence**.[69] While these criteria are only guidelines, most of the EU member states provide detailed independence criteria which, to a large extent, reflect the 2005 Remuneration Recommendation.[70] Belgium has included the entire set of independence criteria included in the 2005 Remuneration Recommendation in the Belgian Company Law (article 526ter of the Company Law) and can as such be considered as a frontrunner in this respect.

France

French company law offers companies a choice between a one-tier formula (board of directors)[71] *and a two-tier formula (supervisory board and management board).*[72] *In addition, companies may opt for the separation or combination of the functions of chairman and chief executive.*

According to the French Commercial Code (Code de commerce), the board of directors consists of 3 to 18 directors (or 24 following a merger of limited liability companies (sociétés anonymes)) appointed by shareholders, at the shareholders' meeting.[73]

In the French CG Code, it is stipulated that the quality of the board of directors cannot be defined simply by reference to a percentage of independent directors, as the directors are above all required to be honest, competent, active, regularly attending and involved, although it is important for the board of directors to include a significant proportion of independent directors, not only in order to satisfy the expectations of the market, but also in order to improve the quality of proceedings (provision 8.1 of the French CG Code). However, provision 8.3 of the French CG Code requires that the independent directors should account for half of the board members in widely-held corporations without

65 European Commission Recommendation 2005/162/EC of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board.
66 Paragraph 7 of the 2005 Remuneration Recommendation.
67 Section II.3.2 and 4 of the 2005 Remuneration Recommendation.
68 Paragraph 8 of 2005 Remuneration Recommendation.
69 Annex II of the 2005 Remuneration Recommendation.
70 European Confederation of Directors' Associations, *A Guide to Corporate Governance Practices in the European Union*, 2015, page 41; Report on the application by the Member States of the EU of the Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board.
71 Articles L.225-17 to L.225-56 of the French Commercial Code.
72 Articles L.225-57 to L.225-93 of the French Commercial Code.
73 Article L.225-17 *juncto* article L.225-95 of the French Commercial Code.

controlling shareholders. In controlled companies,[74] independent directors should account for at least one-third of the board members. Directors representing the employee shareholders and directors representing employees are not taken into account when determining these percentages.

Germany

German company law prescribes a two-tier board system, comprising both a supervisory board and a management board.

While there are no independence criteria in place for the management board, the German CG Code states that the supervisory board shall include what it considers an adequate number of independent members. Not more than two former members of the management board shall be members of the supervisory board. Supervisory board members shall not exercise directorships or similar positions or advisory tasks for important competitors of the enterprise.[75]

Following the recent revision of the German CG Code in 2017, the supervisory board shall report on the number of independent members representing shareholders which it deems appropriate and publish the names of those persons. The ownership structure shall henceforth be taken into consideration when determining the number of independent supervisory board members.[76]

Sweden

The Swedish board system, usually referred to as "the Nordic Model", lies between the Anglo-Saxon one-tier formula and the continental European two-tier formula and can, therefore, be described as a hybrid formula. Swedish company law prescribes neither a classical one-tier, nor a two-tier structure.

According to the Swedish CG Code, the board must consist of no fewer than three members, of which one must be appointed as chair. The Swedish CG Code stipulates that no more than one director elected by the shareholders at the shareholders' meeting may be on the executive management team of the company or one of its subsidiaries.[77] Traditionally, this place is taken by the chief executive officer; however, it is also common that no member of the executive management is a member of the board. Hence, boards of Swedish listed companies are composed entirely or predominantly of non-executive directors.[78]

The Swedish CG Code also states that a majority of the members of the board are to be independent of the company and its executive management.[79]

In addition, at least two members must also be independent of the company's major shareholders; which means that it is possible for major shareholders of Swedish companies to appoint a majority of members with whom they have close ties.[80]

The Netherlands

In accordance with best practice provision 2.1.7 of the Dutch CG Code, the supervisory board is to be composed such that the members are able to operate independently and critically vis-à-vis one another, the management board, and any particular interests involved. In order to safeguard its independence, it is further specified that: (i) any one of the criteria referred to in best practice provision 2.1.8, sections i. to v.[81] (inclusive) should be applicable to, at most, one supervisory board member; (ii) the total number of supervisory board members to whom the criteria referred to in best practice provision 2.1.8 are applicable should account for less than half of the total number of supervisory board members; and (iii) for each shareholder, or group of affiliated shareholders, who directly or indirectly hold more than ten per cent of the shares in the company, there is at most one supervisory board member who can be considered to be affiliated with or representing them as stipulated in best practice provision 2.1.8, sections vi. and vii.

74 Within the meaning of article L.233-3 of the French Commercial Code.
75 Principle 5.4.2 of the German Corporate Governance Code.
76 Principle 5.4.1 of the German Corporate Governance Code
77 Rule 4.3 of the Swedish CG Code.
78 The Swedish CG Code, page 9.
79 Rule 4.4 of the Swedish CG Code.
80 Rule 4.5 of the Swedish CG Code.
81 Provision 2.1.8 of the Dutch CG Code states that "*a supervisory board member is not independent if they or their spouse, registered partner or life companion, foster child or relative by blood or marriage up to the second degree: (i) has been an employee or member of the management board of the company (including associated companies as referred to in Section 5:48 of the Financial Supervision Act (Wet op het financieel toezicht/Wft)) in the five years prior to the appointment; (ii) receives personal financial compensation from the company, or a company associated with it, other than the compensation received for the work performed as a supervisory board member and in so far as this is not in keeping with the normal course of business; (iii) has had an important business relationship with the company or a company associated with it in the year prior to the appointment. This includes, in any event, the case where the supervisory board member, or the firm of which the boardmember is a shareholder, partner, associate or adviser, has acted as adviser to the company (consultant, external auditor, civil notary or lawyer) and the case where the supervisory board member is a management board member or an employee of a bank with which the company has a lasting and significant relationship; (iv) is a member of the management board of a company in which a member of the management board of the company which he/she supervises is a supervisory board member; (v) has temporarily performed management duties during the previous twelve months in the absence or incapacity of management board members; (vi) has a shareholding in the company of at least ten per cent, taking into account the shareholding of natural persons or legal entities cooperating with him or her on the basis of an express or tacit, verbal or written agreement; (vii) is a member of the management board or supervisory board – or is a representative in some other way – of a legal entity that holds at least ten per cent of the shares in the company, unless the entity is a group company.*"

The chairman of the supervisory board should not be a former member of the management board of the company and should be independent within the meaning of best practice provision 2.1.8. (cf. best practice provision 2.1.9 of the Dutch CG Code), and more than half of the members of the audit and remuneration committees should be independent within the meaning of best practice provision 2.1.8.

Pursuant to the law of 6 June 2011 amending Book 2 of the Dutch Civil Code,82 a statutory basis for a one-tier board system was introduced into Dutch company law. The law of 6 June 2011 came into force on 1 January 2013. Consequently, limited liability companies (naamloze vennootschappen), private limited liability companies (besloten vennootschappen), European companies (SE) and European cooperative companies (SCE) may choose to adopt a one-tier board system.

United Kingdom

Save for smaller companies,[83] *at least half the board, excluding the chairman, should comprise non-executive directors determined by the board to be independent. Smaller companies should have at least two independent non-executive directors.*[84]

The Chairman should on appointment meet the independence criteria set out in the UK CG Code.[85] *A chief executive should not go on to be chairman of the same company.*

Led by the senior independent director, the non-executive directors should meet without the chairman present at least annually to appraise the chairman's performance and on such other occasions as are deemed appropriate (provision A.4.2 UK CG Code).

The non-executive directors, led by the senior independent director, should be responsible for the performance evaluation of the chairman, taking into account the views of executive directors (provision B.6.3 UK CG Code).

In accordance with provision 2.3 of the Belgian 2009 Code, at least one half of the board should comprise non-executive directors and at least three of them should be independent according to the detailed independence criteria set out in Appendix A to the Belgian 2009 Code (which in turn refers to article 526ter of the Company Law).

The Guberna and VBO 2014 Report reveals that the average number of independent directors on the boards of listed companies is on average four in Belgium (and thus, on average, higher than the required minimum of three).

Composition of the board of directors (median value)						
	BEL 20 (N=18)	**BEL Mid (N=31)**	**BEL Small (N=29)**	**Total (N=78)**	**Min**	**Max**
Average number of **executive** directors	1	1	2	1	0	5
Average number of **non-executive** directors	10-11	7	7	7	3	20
Average number of **independent** directors	4-5	4	3	4	2	9

Source: Guberna and VBO 2014 Report, figure 2.2, p. 18

Although the **independence criteria may differ, all studied jurisdictions require the presence of an adequate number of independent directors**.

The German CG Code does not include any specific recommended number of independent directors, but merely refers to an adequate number of independent members. The corporate governance codes of the other jurisdictions studied each define a recommended number or proportion of independent directors. According to the French CG Code, the recommended number of independent directors depends on the company's share ownership structure. According to the UK CG Code, the number of independent directors is determined by the size of the company.

82 Law of 6 June 2011 amending Book 2 of the Dutch Civil Code in connection with the adjustment of the rules governing management and supervision in public and private limited companies, *Nederlands Staatsblad* 2011.
83 A smaller company is one that is below the FTSE 350 throughout the year immediately prior to the reporting year.
84 Code Provision B.1.2. of the UK CG Code.
85 Code Provision A.3.1. of the UK CG Code.

2.4 Lead (independent) directors

As set out above, the OECD regards the designation of a lead director as a good-practice alternative to the separation of the role of chief executive officer and chairman of the board. The same recommendation is given by the International Corporate Governance Network (considering it as good practice, if the chair of the board is not independent, for the company to adopt an appropriate structure to mitigate any potential challenges arising from this, such as the appointment of a lead independent director)[86] and the Global Network of Directors Institutes.[87]

The EC is of the opinion that the present or past executive responsibilities of the (supervisory) board's chairman should not stand in the way of the chairman's ability to exercise objective supervision. On a unitary board, one way to ensure this is to ensure that the roles of chairman and chief executive officer are separate; in the case of unitary and dual boards, one option may be that the chief executive does not immediately become the chairman of the (supervisory) board. In cases where a company chooses to combine the roles of chairman and chief executive or to immediately appoint the former chief executive as chairman of the (supervisory) board, this should be accompanied with information on any safeguards put in place.[88]

France

In accordance with provision 2.2 of the French CG Code, companies with a one-tier structure can choose between the separation of the offices of chairman and chief executive officer, and the aggregation of such duties. French law does not favour either formula and allows the board of directors to choose between the two forms of exercise of executive management. It is up to each corporation to decide on the basis of its own specific constraints. When the board of directors opts for the separation of the offices of chairman and chief executive officer, if appropriate, any tasks entrusted to the chairman of the board of directors in addition to those conferred upon him or her by law must be described.

In accordance with provision 6.3 of the French CG Code, when the board of directors has decided to confer upon a director, and in particular a lead director or vice president, special tasks that relate to governance or shareholder relations, these tasks and the resources and the prerogatives to which he or she has access must be described in the internal rules. It is further recommended that the lead director be independent.

Sweden

In accordance with provision 4 of the Swedish CG Code, the chief executive officer may be a member of the board but not its chair.

The Netherlands

In accordance with best practice provision 2.1.9 of the Dutch CG Code, the chairman of the supervisory board should not be a former member of the management board of the company and should be independent within the meaning of best practice provision 2.1.8.

On the occasion of the revision of the Dutch CG Code in 2016, a new chapter addressing companies with a one-tier governance structure was introduced. In accordance with best practice provision 5.1.3, the chairman of a one tier board should not be an executive director or former executive director of the company, and should be independent within the meaning of best practice provision 2.1.8.

United Kingdom

In accordance with provision A.1.2 of the UK CG Code, the annual report should identify the chairman, the deputy chairman (where there is one), the chief executive, the senior independent director and the chairmen and members of the board committees. Provision A.2.1 of the UK CG Code further states that the roles of chairman and chief executive should not be exercised by the same individual and that the division of responsibilities between the chairman and chief executive should be clearly established, set out in writing and agreed by the board.

The chairman is responsible for leadership of the board and ensuring its effectiveness on all aspects of its role. The chairman is responsible for setting the board's agenda and ensuring that adequate time is available for discussion of all agenda items, in particular strategic issues. The chairman should also promote a culture of openness and debate by facilitating the effective contribution of non-executive directors in particular and ensuring constructive relations between executive and non-executive directors. The chairman is responsible for ensuring that the directors receive accurate, timely and clear information. The chairman should ensure effective communication with shareholders.

The responsibilities to be entrusted to the senior independent director are spread throughout the UK CG Code:

86 ICGN Global Governance Principles, provision 2.2.
87 ICGN Regional Conference and Connection Day Madrid, 2 March 2015, https://www.icgn.org/sites/default/files/Strengthening%20the%20role%20of%20Lead%20Independent%20Directors%20-%20an%20essential%20counterbalance%20to%20boardroom%20imperialism.pdf
88 Article 3.2 Recommendation 2005/162/EC.

- *The board should appoint one of the independent non-executive directors to be the senior independent director to provide a sounding board for the chairman and to serve as an intermediary for the other directors when necessary. The senior independent director should be available to shareholders if they have concerns which contact through the normal channels of chairman, chief executive or other executive directors has failed to resolve or for which such contact is inappropriate (provision A.4.1 UK CG Code).*
- *The senior independent director should attend sufficient meetings with a range of major shareholders to listen to their views in order to help develop a balanced understanding of the issues and concerns of major shareholders (provision E.1.1 UK CG Code).*

According to provision 1.5 of the Belgian 2009 Code, the chairman of the board and the chief executive officer should not be the same individual. The division of responsibilities between the chairman and the chief executive officer should be clearly established, set out in writing and agreed by the board.

In general, we observe that there is a tendency for corporate governance codes (including the Belgian 2009 Code) to include the recommendation that the chairman of the board and the CEO should not be the same individual. In this respect, the EC is of the opinion that it is an option to recommend that the CEO may not immediately become the chairman of the board.

In addition to including the recommendation that the persons fulfilling the role of CEO and chairman should not be one and the same individual, the **French CG Code and the UK CG Code make reference to the role of lead director or senior independent director**. Whereas the French CG Code only states that the tasks and the resources and prerogatives to which he or she has access must be described in the internal rules, the **UK CG Code goes further by setting out in more detail the responsibilities of the senior independent director**. Under **the Dutch CG Code, the chairman should be independent**.

2.5 Corporate secretary

Because of the (growing) importance of effective corporate governance, there has been an increased focus on the role of the company secretary in the last decades; however, we note that only limited reference is made to (the tasks of) the company secretary in the corporate governance codes of the jurisdictions studied. In the French, Swedish and German CG Codes, no (or very limited) reference is made to the role of the company secretary.

The Netherlands

In accordance with best practice provision 2.3.10 of the Dutch CG Code, the supervisory board should be supported by the company secretary. The company secretary (i) should ensure that the proper procedures are followed and that the statutory obligations and obligations under the articles of association are complied with; (ii) should facilitate the provision of information of the management board and the supervisory board; and (iii) should support the chairman of the supervisory board in the organisation of the affairs of the supervisory board, including the provision of information, meeting agendas, evaluations and training programmes.

In addition, it is further specified that the company secretary should, either on the motion of the supervisory board or otherwise, be appointed and dismissed by the management board, after the approval of the supervisory board has been obtained. If the secretary also undertakes work for the management board and notes that the interests of the management board and the supervisory board diverge, as a result of which it is unclear which interests the secretary should represent, the secretary should report this to the chairman of the supervisory board.

United Kingdom

In accordance with the supporting principles included under principle B.5 of the UK CG Code, the company secretary's responsibilities include ensuring good information flows within the board and its committees and between senior management and non-executive directors, as well as facilitating induction and assisting with professional development as required. In addition, the company secretary should be responsible for advising the board through the chairman on all governance matters.

Provision B.5.2 of the UK CG Code further clearly states that all directors should have access to the advice and services of the company secretary, who is responsible to the board for ensuring that board procedures are complied with. Both the appointment and removal of the company secretary should be a matter for the board as a whole.

In accordance with provision 2.9 of the Belgian 2009 Code, the board should appoint a company secretary to advise the board on all governance matters. Where necessary, the company secretary should be assisted by the company lawyer and individual directors should have access to the company secretary.

It is further specified in a guideline accompanying provision 2.9 of the Belgian 2009 Code that the role of the company secretary should include ensuring, under the direction of the chairman, good information flow within the board and its committees and between the executive management and non-executive directors, as well as facilitating induction and assisting with professional development as required. The company secretary should regularly report to the board, under the direction of the chairman, on how board procedures, rules and regulations are being followed and complied with. The terms of reference of the board should describe the role and tasks of the company secretary.

Notwithstanding the growing importance of the role of the company secretary, we observe that the corporate governance codes of the studied jurisdictions – with the exception of the UK and Dutch CG Codes and the Belgian 2009 Code – make no or very limited reference to (the role of) the company secretary.

As is the case in the Dutch and the UK CG Codes, **the Belgian 2009 Code clearly sets out the responsibilities of the company secretary**:

– advising of the board on all governance matters;
– ensuring good information flow within the board and its committees and between the executive management and non-executive directors;
– facilitating induction and assisting with professional development as required; and
– regular reporting to the board on how board procedures, rules and regulations are being followed and complied with.

The responsibilities assigned to the company secretary by the Belgian 2009 Code are similar to the responsibilities assigned by the UK CG Code and the Dutch CG Code.

2.6 Disclosure of attendance

In accordance with Principle VI E.3 of the G20/OECD Principles of Corporate Governance, board members should be able to commit themselves effectively to their responsibilities. Achieving legitimacy would be facilitated by the publication of attendance records for individual board members (eg whether they have missed a significant number of meetings).

France

The French CG Code expressly states that all directors are expected to possess as an essential quality "regularity of attendance, active participation and involvement".[89]

The number of meetings of the board of directors and of the committees held during the past financial year should be listed in the annual report, which must also provide the shareholders with any relevant information relating to the directors' attendance at such meetings.[90]

Recently, a chapter 19 "Ethical Rules for Directors" was added to the French CG Code, which states, among other things, that any director of a listed corporation should consider himself or herself as being bound by the obligation to be regular in his or her attendance and take part in all meetings of the board and any committees of which he or she is a member. He or she must also be present at the general meeting of shareholders.

Further, in the French CG Code it is emphasised that the method of allocation of directors' compensation, the total amount of which is determined by the meeting of shareholders, is set by the board of directors. The board of directors should take account, in such ways as it shall determine, of the directors' actual attendance at meetings of the board of directors and committees, and the amount of such remuneration shall consist primarily of a variable portion.

Germany

If a member of the supervisory board has taken part in only half or less of the meetings of the supervisory board and of the committees to which he or she belongs in a financial year, this shall be noted in the report of the supervisory board. In that regard, participation by telephone or video conference also qualifies as participation; however, this should not be the rule.[91]

Sweden

The number of board meetings held and each member's attendance at the board meetings, including each member's attendance at the board committee meetings, must be included in the corporate governance report, if this information is not presented in the annual report.[92]

89 Provision 6.1 of the French CG Code.
90 Provision 10.1 of the French CG Code.
91 Principle 5.4.7 of the German CG Code.
92 Rule 10.2 of the Swedish CG Code.

The Netherlands

In accordance with best practice provision 2.4.4 of the Dutch CG Code, supervisory board members should attend supervisory board meetings and the meetings of the committees of which they are a part. If supervisory board members are frequently absent from these meetings, they should be held to account for this. The report of the supervisory board should state the absenteeism rate from supervisory board and committee meetings of each supervisory board member.

United Kingdom

According to provision A.1.2 of the UK CG Code, the annual report should set out the number of meetings of the board and the committees. Additionally, the annual report should also set out the individual attendance by the directors. Investors will typically expect an explanation in the event of low attendance.

According to provision 2.8 of the Belgian 2009 Code, the number of board and board committee meetings and the individual attendance records of directors should be disclosed in the corporate governance statement.

The Guberna and VBO 2014 Report reveals that 71 out of 78 of the companies (91%) disclose the individual attendance rate of their directors at board meetings. The attendance rate of directors at board committee meetings is disclosed by 64 out of 78 companies (82%).

Only a few companies explain why they do not disclose the individual attendance rate of their directors. The other companies disclose an overall participation rate or an individual attendance rate on an anonymous basis without providing any explanation. Remarkably, the BEL Mid companies have the lowest scores (81% in relation to the board meetings and 71% in relation to the board committee meetings).

Application rate of Provision 2.8 of the Belgian 2009 Code							
	2013 (N=78)	**BEL 20 (N=18)**	**BEL Mid (N=31)**	**BEL Small (N=29)**	**2011 (N=83)**	**2008 (N=94)**	**2005 (N=85)**
Transparency on the **attendance rate at the board of directors**	**91%**	100%	81%	97%	92%	60%	66%
Transparency on the **attendance rate at the board committees**	**82%**	94%	71%	86%	81%	not researched	not researched

Source: Guberna and VBO 2014 Report, figure 1.3, p. 11

Notwithstanding the fact that the compliance numbers are quite high, the Guberna and VBO 2014 Report reveals that there is still some room for improvement regarding the disclosure of the individual attendance rate at the board committees, especially at the BEL Mid companies.

The Swedish, UK, French CG Codes and the Belgian 2009 Code recommend disclosing the number of board (committee) meetings held in the annual report or the corporate governance statement. The Dutch and the German CG Codes, as well as the G20/OECD Principles of Corporate Governance, do not expressly recommend disclosing this information.

The Swedish and UK CG Codes and the Belgian 2009 Code expressly recommend disclosing the individual attendance record of directors at the board (committee) meetings in the annual report or the corporate governance statement. **The G20/OECD Principles of Corporate Governance also encourage the publication of attendance records for individual board members**. The French CG Code does not expressly refer to the disclosing of the *individual* attendance record of directors. Instead, the French CG Code recommends the disclosure of *any relevant information relating to the directors' attendance.* The German and the Dutch CG Codes, on the other hand, focus on disclosing the (frequent) absenteeism of directors and according to the Dutch CG Code the report of the supervisory board should state the absenteeism rate from supervisory board and committee meetings of each supervisory board member.

The French CG Code is the only code that states that directors should be **bound by the obligation of regular attendance and take part in all meetings of the board and any committees of which they are a member**.

3. Principle 3 – All directors shall demonstrate integrity and commitment

"Boards need to think deeply about the way in which they carry out their role and the behaviours that they display, not just about the structures and processes that they put in place."
Source: FRC Guidance on Board Effectiveness

CURRENT TEXT OF THE BELGIAN 2009 CODE
3.1 Independence of judgement is required in the decisions of all directors, executive and non-executive alike, whether the non-executive directors are independent or not.
3.2 Directors should make sure they receive detailed and accurate information and should study it carefully so as to acquire and maintain a clear understanding of the key issues relevant to the company's business. They should seek clarification whenever they deem it necessary.
3.3 While executive and non-executive directors are part of the same collegial body, they each have a specific and complementary role to play on the board.
Guideline Executive directors should provide all relevant business and financial information for the board to function effectively.
Guideline Non-executive directors should constructively challenge and help develop strategy and key policies proposed by the executive management.
Guideline Non-executive directors should scrutinise the performance of the executive management in meeting agreed goals.
3.4 Directors cannot use the information obtained in their capacity as director for purposes other than for the exercise of their mandate.
Guideline Directors have an obligation to handle the confidential information received in their capacity as director with caution.
3.5 Each member of the board should arrange his 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 arms' length.
3.6 The board should establish a policy for transactions or other contractual relationships between the company, including its related companies, and its board members, which are not covered by the legal provisions on conflicts of interest. This policy should be disclosed in the CG Charter. Comments on the application of this policy should be disclosed in the CG Statement.
3.7 The board shall take all necessary and useful measures for effective and efficient execution of the Belgian rules on market abuse. In this respect it should at least adhere to the provisions and guidelines laid down in Appendix B.

3.1 Topics for change – introduction

Studies and monitoring reports show that, irrespective of how detailed corporate rules may be, actual behaviour, quality and ethics are important. In the Grant Thornton Global Governance Report 2015[93], integrity and transparency are even highlighted as the rules that should govern every action a business takes.

Confronted with a box-ticking formalistic application of the codes, the developers of the codes are inclined to go beyond the compliance-driven and procedural provisions and adopt a more performance and behavioural approach.

Such behavioural provisions can be vague or precise, or general or specific. It is often difficult and it may even be counterproductive to impose strict and hard rules on directors. However, it is certainly the aim of a corporate governance code to steer directors in their performance, to ensure that they discharge their duties in the best interests of the company.

One may question whether a corporate governance code is the right place for conduct rules for directors. In principle, individual directors cannot be considered as addressees of the code: the first addressee of the code is the company as a whole, represented by the board as a whole. Also, the application of the 'comply or explain' principle, which is typical in corporate governance codes, is not evident for general behavioural or ethical rules governing directors' conduct.

93 Grant Thornton International Ltd., Corporate Governance, the tone from the top, 2015, https://www.grantthornton.global/globalassets/1.-member-firms/global/insights/article-pdfs/2015/corporate-governance-final-a4-lr.pdf

3.2 Rules of conduct in codes

We note that the corporate governance codes of Belgium, France, Germany, Sweden, the Netherlands and the United Kingdom contain various rules of conduct, which are presented in many different ways. As was the case in 2012 (see the 2012 A&O Study), the following conduct rules are most frequently referred to in the corporate governance codes:

- **Availability/commitment** – See further section 4;
- **Entrepreneurship/Leadership** – All but three of the codes (ie the French, German and Swedish CG Codes), cite or refer to this more abstract rule of conduct (sometimes in the preamble and sometimes in the main body or the underlying notions).
- **Confidentiality/Discretion** – Except for the Dutch CG, the Swedish and the UK CG Codes, the codes of the jurisdictions studied refer to confidentiality or discretion. The duty of confidentiality is a clear and precise rule, which in principle allows for it to be imposed by a corporate governance code. The duty of confidentiality is often supplemented with a transparency or disclosure requirement (*inter alia* in light of the 'comply or explain' principle).
- **Autonomy/Independent judgement** – Except for the French, the German and the UK CG Codes, all of the codes refer to 'autonomy', 'independence' or 'critical reflection' as a rule of conduct for directors.
- **Integrity/Honesty/Loyalty** – In all but one of the codes (the UK CG Code), reference is made to the more 'ethical' rules of conduct, being integrity, honesty and loyalty.
- **Acting in the corporate interest** – The corporate interest is referred to in each of the codes. This rule of conduct is referred to in both the preamble and in the main body of the codes. The need to act in the corporate interest can indeed be considered a 'guiding principle' of corporate governance.
- **Corporate Social responsibility/Acting in the interests of the stakeholders** – The Belgian 2009 Code and the Dutch and German CG Codes expressly require that directors take corporate social responsibility or the interests of stakeholders into account. The concept of corporate interest referred to above, potentially also encompasses the interests of stakeholders.

In light of its own traditions and culture, and in line with the existing applicable legal frameworks, each of the jurisdictions studied has its own approach, its own specific emphasis and its own version of rules of conduct for directors.

France

The French CG Code extensively describes general and specific rules of conduct for directors in a section entitled "Membership of the board of directors: guiding principles" and a section entitled "Ethical rules for directors". The 'comply or explain' principle applies to these rules of conduct.

Germany

The German CG Code provides succinct but diverse guidance on directors' conduct. The German rules of conduct are typically rules on ensuring good cooperation between the management board and supervisory board, having open discussions and the due care and diligence of a prudent and conscientious managing director or supervisory board member. The rules of conduct referred to in the German CG Code can be described as 'qualitative' rather than 'ethical'. However, since its recent revision in 2017 the German CG Code explicitly states that social market economy does not only require conduct in a legal sense, but also ethical and self-responsible behaviour.

Sweden

In the Swedish CG Code, the concise fifth chapter is devoted to the tasks of the directors. The introductory text to the principles included in this chapter, which does not actually form part of the code rules that must be complied with, states that each director is to act independently and with integrity in the interests of the company and all of its shareholders. The principles included in this chapter mainly relate to the obligation for directors to form opinions independently and the obligation for each director to continuously acquire knowledge of the company's operations, organisation and markets necessary to carry out its assignment.

The Netherlands

The Dutch CG Code also contains a large number of conduct rules for directors, most of which are included under principle 2 "Effective management and supervision". Typical behavioural rules that are included in the Dutch CG Code cover corporate social responsibility, conflicts of interest, accountability and critical reflection. The 'comply or explain' principle applies to both principles and provisions and therefore, also to the conduct rules set out in the Dutch CG Code.

United Kingdom

In the UK, some conduct rules have been in place for many years and have been amended and added to over time to ensure that they reflect market practice and the concerns of the business community generally. In accordance with Section A of the UK CG Code, all directors must act in what they consider to be the best interests of the company, consistent with their statutory duties. For directors of UK incorporated companies, these duties are codified in the Companies Act 2006.

The current UK CG Code[94] briefly describes rules of conduct for directors both in the preface and in the main body of the code. The conduct rules that are referred to in the preface to the UK CG Code, but which are different from those referred to in the Companies Act 2006, are rules regarding: personal reporting on governance by the chairman, effective and prudent management, frankness, openness of mind, mutual respect and openness and accountability.

The Financial Reporting Council (the ***FRC****) has issued its Guidance on Board Effectiveness, which is intended to stimulate boards' to think about how they can carry out their role most effectively. It is the intention of the FRC to replace this Guidance with new material that has culture at its heart, to support the application of the UK CG Code.[95] This review and update is currently underway.*

Compared to the corporate governance codes in the neighbouring jurisdictions, the 2009 Belgian Code contains a rather comprehensive set of (ethical and qualitative) behavioural rules for directors. In addition to those points referred to above, typical rules included in the Belgian 2009 Code are reflected in (i) the provision stating that no individual or group of directors should dominate the board's decision-making and that no one individual should have unfettered powers of decision-making; and (ii) the provision stating that necessary measures should be taken to develop a climate of trust within the board, contributing to open discussion, constructive dissent and support for the board's decisions.

The behavioural rules have been in place from the outset (ie they were in the Lippens Code) and were further developed in the current Belgian 2009 Code. Values such as entrepreneurship, integrity and commitment are emphasised. The various rules are set out in different parts of the Belgian 2009 Code, ie in the preamble, as well as in its principles, provisions and guidelines. Thus, the applicability of the 'comply or explain' principle depends on where the relevant rule appears in the 2009 Belgian Code.

Clearly, having the right structures in place does not guarantee a well-functioning board. If a box-ticking, formalistic application of corporate governance codes is applied, companies can lose sight of the true purpose of these codes.

Transparency can be a useful indicator of the extent of any issues and a spur to promote appropriate behaviour. However, merely putting in place detailed disclosure requirements may not suffice, and may in fact be instrumental in creating a 'box-ticking' mentality and making the available information even more opaque. Enhancing the informative quality of 'explaining' deviations from the 2009 Belgian Code may improve the situation but, in our view, can only partially remedy it.

Putting in place conduct rules for directors may encourage the desired behaviour and may discourage 'window-dressing' compliance with corporate governance codes. The 'comply or explain' principle is difficult to apply to these rules but board evaluation may be an occasion to monitor the behavioural rules. In a study by Heidrick & Struggles, it was also recommended to conduct more thorough reviews of board performance that combine an assessment of process and structure with an evaluation of behavioural competencies.[96]

It indeed seems that both procedural/technical rules and behavioural rules are required to achieve the goals that an effective corporate governance framework should deliver.

But are corporate governance codes the ideal place to 'accommodate' a set of behavioural rules for directors?

One could conceive a structure in which behavioural rules are set out as code principles (which must be complied with), but where the corresponding technical rules are then developed in the provisions (to which the 'comply or explain' principle applies). Indeed, many procedural rules are mere illustrations of more general rules of conduct. For instance, provisions on the maximum number of board mandates and on the disclosure of the individual board attendance rate aim, in practice, to ensure directors' availability and commitment.

However, first, codes are not primarily addressed at individual directors: they are addressed at companies and at the board as a whole. Secondly, not all behavioural or ethical rules (and especially those without a corresponding technical rule,

94 The Preamble to the UK CG Code states: "*One of the key roles for the board includes establishing the culture, values and ethics of the company. It is important that the board sets the correct 'tone from the top'. The directors should lead by example and ensure that good standards of behaviour permeate throughout all levels of the organisation. This will help prevent misconduct, unethical practices and support the delivery of long-term success.*".

95 FRC, Plan & Budget and Levies 2016/17, April 2016, https://www.frc.org.uk/Our-Work/Publications/FRC-Board/Plan-Budget-and-Levies-2016-17.pdf

96 Heidrick & Struggles, European Corporate Governance Report 2011, Challenging board performance, 2011, p.13.

such as loyalty, entrepreneurship and openness of mind) are suitable to be included as principles in a code. Consequently, an annex or a separate guidance note may be a more appropriate place to address those rules.

Guberna has already launched its guidance for individual directors by means of the "*Toolkit for the Director*".[97] The Director's Toolkit reflects an ideal vision of how directors should act and the direction they should take towards a common ground or reference point which, in theory, each director can reach. The governance practices laid out in the Toolkit are intended to help directors reach this common ground, by providing encouragement and inspiration, while leaving them ample room to determine their own objectives and path in light of each company's specificities.

The importance of this guidance for individual directors may be invigorated by inserting a reference to it in the Belgian 2009 Code. Such reference can be made at two levels: (i) board evaluation, where individual behaviour and compliance with rules of conduct could be taken into account and (ii) the selection process, where more emphasis could be placed on soft aspects (such as attitude, values, commitment, etc). In this manner, 'director governance' will become another supporting beam of the Belgian 2009 Code and the whole Belgian corporate governance framework.

In comparison to the codes of other jurisdictions studied, the Belgian 2009 Code contains a rather extensive set of both ethical and qualitative rules of conduct for directors. However, one may question whether the Belgian 2009 Code is the most suitable place for rules of conduct for directors, since a corporate governance code is by definition addressed at companies (and thus at the boards of directors as a whole and not at individual directors).

Also, behavioural rules are difficult to build within the structure of the Belgian 2009 Code: there are too many of them to include in the principles, they are not 100% compatible with the 'comply or explain' principle, which applies to the provisions, and yet they are too numerous and too important (especially as compared to the technical rules) to include in the guidelines.

We welcome the Guberna initiative of providing guidance specifically addressed at individual directors ("*Toolkit for the Director*"). The Belgian 2009 Code could recommend assessing these individual rules of conduct or behavioural aspects (i) at the directors' evaluation and (ii) on the directors' (re-)appointment.

97 http://www.guberna.be/sites/default/files/tools/toolkit/TOOLKIT_EN.pdf

4. Principle 4: The company shall have a rigorous and transparent procedure for the appointment and evaluation of the board and its members

CURRENT TEXT OF THE BELGIAN 2009 CODE

Nomination and appointment

4.1 There should be a rigorous and transparent procedure for an efficient appointment and re-appointment of directors. The board should draw up nomination procedures and selection criteria for board members, including specific rules for executive and non-executive directors where appropriate.

4.2 The chairman of the board or another non-executive director should lead the nomination process. The nomination committee should recommend suitable candidates to the board. The board should then make proposals for appointment or re-election to the general shareholders' meeting.

4.3 For any new appointment to the board, the skills, knowledge and experience already present and those needed on the board should be evaluated and, in the light of that evaluation, a description of the role and skills, experience and knowledge needed should be prepared (also referred to as a 'profile').

4.4 When dealing with a new appointment, the chairman of the board should ensure that, before considering the candidate, the board has received sufficient information such as the candidate's curriculum vitae, an assessment of the candidate based on the candidate's initial interview, a list of the positions currently held by the candidate, and, if applicable, the necessary information about the candidate's independence.

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

Guideline Non-executive directors should undertake to have sufficient time to meet what is expected of them, taking into account the number and importance of their other commitments.

4.6 Any proposal for the appointment of a director by the general shareholders' meeting should be accompanied by a recommendation from the board, based on the advice of the nomination committee. This provision also applies to proposals for appointment originating from shareholders.

The proposal should specify the proposed term of the mandate, which should not exceed four years. It should be accompanied by relevant information on the candidate's professional qualifications together with a list of the positions the candidate already holds. The board will indicate which candidates satisfy the independence criteria set out in Appendix A.

Without prejudice to applicable legal provisions, proposals for appointment should be communicated at least 24 days before the general shareholders' meeting, together with the other points on the agenda of the general shareholders' meeting.

4.7 The board should appoint its chairman on the basis of his knowledge, skills, experience and mediation strength. If the board envisages appointing the former CEO as chairman, it should carefully consider the positive and negative aspects in favour of such a decision and disclose in the CG Statement why such appointment is in the best interest of the company.

Professional development

4.8 The chairman should ensure that the newly appointed directors receive an appropriate induction to ensure their swift contribution to the board.

Guideline The induction process should help the director grasp the fundamentals of the company, including its strategy, values, governance, business challenges, key policies, finance, risk management and internal control systems.

4.9 For directors joining board committees, the induction provided should encompass a description of their specific role and duties and any other information linked to the specific role of that committee.

Guideline For new audit committee members, this programme should cover the audit committee's terms of reference and provide an overview of the company's internal control organisation and risk management systems. They should be provided, in particular, with full information on the company's specific operational, financial, accounting and auditing features. This induction should also include meeting the external auditor and the relevant company staff.

4.10 Directors should update their skills and improve their knowledge of the company to fulfil their role both on the board and on board committees.

Guideline Necessary resources should be made available to develop and update the directors' knowledge and skills.

Evaluation

4.11 Under the lead of its chairman, the board should regularly (eg at least every two to three years) assess its size, composition, performance and *those of its committees, as well as its interaction with the executive management.*

Guideline Regular evaluation by the board of its own effectiveness should promote continuous improvement in the governance of the company.

Guideline The evaluation process should have four objectives:

- *assessing how the board or the relevant committee operates;*
- *checking that the important issues are suitably prepared and discussed;*
- *evaluating the actual contribution of each director's work, the director's presence at board and committee meetings and his constructive involvement in discussions and decision-making; and*
- *checking the board's or committee's current composition against the board's or committee's desired composition.*

Guideline Although evaluation is a board responsibility, the board should be assisted in this evaluation by the nomination committee, and possibly also by external experts.

4.12 The non-executive directors should regularly (preferably once a year) assess their interaction with the executive management. In this respect, non-executive directors should meet at least once a year in the absence of the CEO and the other executive directors.

4.13 There should be a periodic evaluation of the contribution of each director aimed at adapting the composition of the board to take account of changing circumstances. When dealing with re-election, the director's commitment and effectiveness should be evaluated in accordance with a pre-established and transparent procedure.

Guideline Special attention should be given to the evaluation of the chairman of the board and the chairmen of the committees.

4.14 The board should act on the results of the performance evaluation by recognising its strengths and addressing its weaknesses. Where appropriate, this will involve proposing new members for appointment, proposing not to re-elect existing members or taking any measure deemed appropriate for the effective operation of the board.

Guideline The board should satisfy itself that plans are in place for the orderly succession of appointments to the board. It should satisfy itself that any appointment and re-election, whether of executive or non-executive directors, will allow an appropriate balance of skills and experience to be maintained on the board.

4.15 Information on the main features of the evaluation process of the board, its committees and its individual directors should be disclosed in the CG Statement.

4.1 Topics for change – introduction

In accordance with principle 4 of the Belgian 2009 Code, listed companies must have a rigorous and transparent procedure in place for the appointment and evaluation of the board and its members. This principle includes provisions and recommendations on the nomination and appointment of directors and on their professional development and evaluation. In this section, special attention is paid to the evaluation of directors and the availability and commitment of non-executive directors.

4.2 Evaluation

(a) Introduction

In accordance with the G20/OECD Principles of Corporate Governance, boards should regularly carry out evaluations to appraise their own performance and to assess whether they possess the right mix of backgrounds and competencies.[98]

The 2014 H&S Study seems to confirm that, in recent years, performance evaluations of boards have had an impact on board performance (particularly in the areas of team dynamics, processes, culture, competencies and behaviour).[99] However, many directors still seem quite reluctant to perform regular, formal board evaluations. The Guberna and VBO 2014 Report revealed that disclosure of the periodicity of the board evaluation and

Dynamic governance demands robust and continual evaluation of the board's performance as well as the identification and development of talented people. Neglecting these elements of dynamic

98 Principle VI E.4 of the G20/OECD Principles of Corporate Governance.
99 Heidrick & Struggles 2014, p. 15.

the date on which such evaluation has occurred (or will occur) is one of the provisions of the Belgian 2009 Code that is least complied with.[100]

There are a number of reasons why boards are not willing to conduct evaluations of their own performance.[101]

governance comes with a heavy price.
2014 H&S Study, p. 15

REASONS FOR NO BOARD EVALUATION
– Lack of available information and guidance on best practices.
– Directors may feel uncomfortable about being evaluated.
– The pressure of day-to-day activities.
– Evaluation might be perceived as a sign that the board lacks trust or confidence in the CEO's performance.
– Lack of skills and expertise to undertake effective evaluations.
– No emphasis on planning or evaluation.
– No performance targets to measure performance against.
– Concerns over the issues that an evaluation might raise.
– Former board evaluations have been ineffective.

According to the 2015 Guide to EU Corporate Governance, successful board evaluations have a number of common attributes, including, but not limited to, the following: (i) the purpose, objectives, process and outcomes have been fully explained and discussed with all concerned parties; (ii) strict confidentiality; (iii) the chairman and the CEO play key roles in developing and approving the process; (iv) the evaluation process is a regular annual process; (v) benchmarks of board, committee, executive and company effectiveness are used as performance indicators; (vi) the evaluation uses a written format that is discussed by all relevant parties; (vii) the chairman provides the full board with a report; and (viii) the process itself is evaluated for improvements to be undertaken in the following year.[102]

In practice, the evaluation practices can vary as to:

- the frequency of evaluations (see section 4.2(b) below);
- the degree of formality (see section 4.2(c) below);
- the persons conducting the evaluation exercise (see section 4.2(d) below);
- the involvement of an external consultant (see section 4.2(e) below); and
- the disclosure of the evaluation results (see section 4.2(f) below).

(b) The frequency of evaluations

The EC recommends that (supervisory) boards carry out an annual evaluation of their performance.[103] However, the 2014 H&S Study revealed that only 70% of European listed companies carried out a performance evaluation every year; 8% of European listed companies do this once every two years, 6% do this once every three years (or less), and 16% never conduct a performance evaluation.[104]

Of the jurisdictions studied, only the German CG Code does not contain specific provisions regarding the frequency of evaluations. Whereas the French, UK, Dutch and Swedish CG Codes recommend an annual evaluation process, the Belgian 2009 Code recommends that a board evaluation takes place at least every two to three years.

[100] Guberna and Het Verbond van Belgische Ondernemingen (VBO), *Onderzoeksrapport Naleving van de Belgische Corporate Governance Code 2009 bij de Bel 20, Bel Mid en Bel Small ondernemingen. Jaarverslagen 2014*, p. 27.
[101] 2015 Guide to EU Corporate Governance, p. 56.
[102] 2015 Guide to EU Corporate Governance, p. 56.
[103] Section II.8 of the 2005 Remuneration Recommendation.
[104] 2014 H&S Study, p. 32.

(c) The degree of formality

In its 2005 Remuneration Recommendation, the EC does not specify how the annual evaluation should be carried out. It merely states that "*the annual evaluation by the board should encompass an assessment of its membership, organisation and operation as a group, an evaluation of the competence and effectiveness of each board member and of the board committees, and an assessment of how well the board has performed against any performance objectives which have been set.*"[105]

The 2014 H&S Study reveals that the evaluation methods used to evaluate the performance of the board vary:

- 78% of the boards use questionnaires;
- 65% use open discussions; and
- 54% use one-on-one-interviews with directors.[106]

The Belgian, French, UK, Dutch and Swedish CG Codes contain provisions on the manner in which evaluations should be performed. However, these provisions are rather general and do not refer to any specific evaluation methods that could be used.

(d) The persons conducting the evaluation exercise

According to the EC, the 'board' is responsible for its annual evaluation.[107]

The governing bodies/individual(s) responsible for conducting the evaluation process often differ depending on who is being evaluated. The following table shows who is responsible for evaluating the board of directors, the chairman and the CEO.[108] In summary, the evaluation of the board of directors is mostly the responsibility of the chairman and/or the other directors. Evaluation of the chairman is mostly the responsibility of the other directors, and evaluation of the CEO is most likely the responsibility of the chairman and/or the board members.[109]

Whose responsibility is it to evaluate?
Percentages in each column may add up to over 100% due to multiple responses

	Board	Chairman	CEO
The chairman	41%	4%	30%
A committee	13%	12%	18%
Senior/Lead independent director	4%	14%	3%
Board members	33%	53%	52%
External consultant/facilitator	17%	11%	5%
Other	4%	5%	5%
No one/not applicable	5%	11%	6%

Source: 2014 H&S Study, figure 26, p. 32

All the codes in the jurisdictions studied indicate that the evaluation of the board is mostly the responsibility of the board itself (under the lead of the chairman).

(e) The involvement of an external consultant

The 2015 Guide to EU Corporate Governance points out that some companies use an external consultant or facilitator to facilitate board evaluations.[110] Some of the codes in the jurisdictions studied also recommend or offer this possibility. The French CG Code, for example, expressly recommends that listed companies conduct a formal evaluation (under the

105 Section II.8 of the 2005 Remuneration Recommendation.
106 2014 H&S Study, p. 31.
107 Section II.8 of the 2005 Remuneration Recommendation.
108 2015 Guide to EU Corporate Governance, p. 56.
109 2014 H&S Study, p. 32.
110 2015 Guide to EU Corporate Governance, p. 56.

leadership of the appointment or nomination committee or an independent director assisted by an external consultant) at least once every three years.[111] The Belgian 2009 Code and the UK CG Code state that the use of an external facilitator is optional.

According to the 2014 H&S Survey, 21% of European listed companies use external consultants/facilitators every year to carry out the performance evaluation process, 10% use external consultants/facilitators once every two years, 36% use external consultants/facilitators once every three years (or less) and 33%, never use external consultants/facilitators.[112]

(f) The disclosure of the evaluation results

In its 2005 Remuneration Recommendation, the EC recommends that *the (supervisory) board should make public at least once a year (as part of the information disclosed by the company annually on its corporate governance structures and practices) adequate information about its internal organisation and the procedures applicable to its activities, including an indication of the extent to which the self-evaluation performed by the (supervisory) board has led to any material change*.[113]

The Belgian 2009 Code contains a transparency recommendation according to which listed companies are required to disclose in their corporate governance statement how a performance evaluation has been conducted. Contrary to the French CG Code, the Belgian 2009 Code does not expressly recommend that companies publicly disclose the extent to which the self-evaluation performed by the board has led to any (material) changes.

France

According to the French CG Code, the board of directors must evaluate its ability to meet the expectations of the shareholders that have entrusted their authority to it to direct the corporation, by periodically reviewing its membership, organisation and operation (this involves a corresponding review of the board's committees). Accordingly, the board of directors should think about the desirable balance in its membership and of the board committees, and consider the adequacy of its organisation and operation for the performance of its tasks.[114]

Such evaluation should have three objectives:

- *to assess the way in which the board of directors operates;*
- *to check that the important issues are suitably prepared and discussed; and*
- *to measure the actual contribution of each director to the board's work through his or her competence and involvement in discussions.*[115]

The evaluation should be performed in the following manner:

- *once a year, the board of directors should dedicate one of the items on its agenda to a debate concerning its operations;*
- *there should be a formal evaluation at least once every three years. This could be implemented under the leadership of the appointments or nominations committee or an independent director, with the help of an external consultant; and*
- *the shareholders should be informed in the annual report of the evaluations carried out and, if applicable, of any steps that were taken as a result thereof.*[116]

Germany

The German CG Code only states that it is the task of the supervisory board to examine the efficiency of its activities on a regular basis.[117]

Sweden

The Swedish CG Code stipulates that the board of directors must evaluate its own work annually by using a systematic and structured process, with the aim of developing the board's operating methods and efficiency. The results of such evaluation must be reported to the nomination committee. The corporate governance report must state how the evaluation of the board of directors has been conducted and reported.[118] *In addition, the board of directors must also continuously evaluate the work of the CEO. In accordance with rule 8.2 of the Swedish CG Code, the board is to examine this issue formally, at least once a year, and no member of the executive management is to be present during this evaluation process.*

111 Provision 9.3 of the French CG Code.
112 2015 Guide to EU Corporate Governance, p. 56; 2014 H&S Study 2014, p. 32.
113 Section II.9.1 of the 2005 Remuneration Recommendation.
114 Provision 9.1 of the French CG Code.
115 Principle 9.2 of the French CG Code.
116 Principle 9.3 of the French CG Code
117 Principle 5.6 of the German CG Code.
118 Rule 8.1 of the Swedish CG Code.

The Netherlands

In accordance with principle 2.2 of the Dutch CG Code, the functioning of the management board and the supervisory board as a collective and the functioning of individual members should be evaluated on a regular basis. This principle is detailed further in three supporting best practice provisions:

- ***Evaluation by the supervisory board**: at least once per year, outside the presence of the management board, the supervisory board should evaluate its own functioning, the functioning of the various committees of the supervisory board and that of the individual supervisory board members, and should discuss the conclusions that are attached to the evaluation. In doing so, attention should be paid to (i) substantive aspects, mutual interaction and the interaction with the management board; (ii) events that have occurred in practice from which lessons may be learned; and (iii) the desired profile, composition, competencies and expertise of the supervisory board.*
- ***Evaluation of the management board**: at least once per year, outside the presence of the management board, the supervisory board should evaluate both the functioning of the management board as a whole and that of the individual management board members, and should discuss the conclusions that must be attached to the evaluation, such also in light of the succession of management board members. At least once annually, the management board should also evaluate its own functioning as a whole and that of the individual management board members.*
- ***Evaluation accountability**: the supervisory board's report should state (i) how the evaluation of the supervisory board, the various committees and the individual supervisory board members has been carried out; (ii) how the evaluation of the management board and the individual management board members has been carried out; and (iii) what has been or will be done with the conclusions of those evaluations.*

The Dutch CG Committee is of the opinion that a periodic review can enhance the quality of the functioning of the supervisory board and the management board, and can help to ensure that the right choices are made when preparing appointments or reappointments of supervisory and management board members. It is further specified in the explanatory notes to the Dutch CG Code that the review may take place collectively, on an individual basis between the chairman and each member separately, or through the input of an external adviser.

United Kingdom

According to the UK CG Code, the board should undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual directors.[119] In accordance with the principle supporting this principle, any evaluation of the board should consider the balance of skills, experience, independence and knowledge of the company on the board, its diversity, including gender, how the board works together as a unit, and other factors relevant to its effectiveness. The chairman should act on the results of the performance evaluation by recognising the strengths and addressing the weaknesses of the board and, where appropriate, proposing that new members be appointed to the board or seeking the resignation of directors. Individual evaluation should aim to show whether each director continues to contribute effectively and to demonstrate commitment to the role (including commitment of time for board and committee meetings and any other duties).

The annual report must state how the evaluation of the board of directors, its committees and the individual directors has been conducted[120] and investors will expect an explanation of the issued identified.

Evaluation of the board of FTSE 350 companies should be externally facilitated at least once every three years. The external facilitator should be identified in the annual report and a statement must be made regarding its independence.[121]

The non-executive directors, led by the senior independent director, should be responsible for performance evaluation of the chairman, taking into account the views of executive directors.[122]

In accordance with provision 4.11 of the Belgian 2009 Code, the board should regularly (eg at least once every two to three years), under the lead of its chairman, assess its size, composition, performance, and those of its committees, as well as its interaction with the executive management. Provision 4.11 is supplemented by a guideline stating that although evaluation is a board responsibility, the board should be assisted in its evaluation by the nomination committee, and possibly also by external experts.

On the other hand, the non-executive directors should regularly (preferably once a year) assess their interaction with the executive management. In addition, there should be a periodic evaluation of the contribution of each director which is aimed at adapting the composition of the board to take into account changing circumstances in accordance with provision 4.13 of the Belgian 2009 Code.

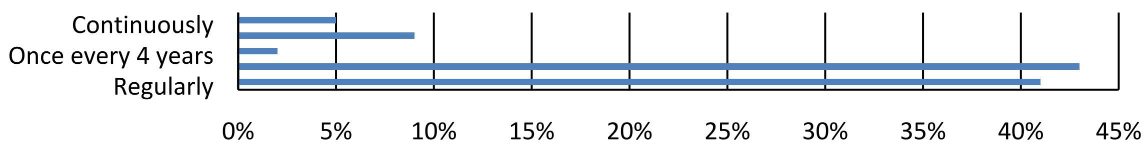
119 Provision B.6 of the UK CG Code.
120 Provision B.6.1 of the UK CG Code.
121 Provision B.6.2 of the UK CG Code.
122 Provision B.6.3 of the UK CG Code.

In accordance with provision 4.14 of the Belgian 2009 Code, the board should act on the results of the performance evaluation by recognising its strengths and addressing its weaknesses. Where appropriate, this will involve proposing new members for appointment, proposing not to re-elect existing members or taking any measures deemed appropriate for the effective operation of the board.

Provision 4.15 of the Belgian 2009 Code also contains a transparency recommendation, according to which Belgian listed companies are required to disclose how this performance evaluation has been conducted in the corporate governance statement.

According to the Guberna and VBO 2014 Report[123], 58 out of the 78 (74%) Belgian listed companies studied reported on the periodicity of the evaluation process in their 2014 corporate government statements: 24 out of the 78 companies (41%) indicated in their statements that they conduct an evaluation regularly, 25 companies (43%) indicated that they conduct an evaluation once every two to three years, one company (2%) indicated that it conducted an evaluation once every four years, five companies (9%) indicated that they conduct an evaluation annually and three companies (5%) indicated that they continuously evaluate their board of directors.

Periodicity of the evaluation process in the Belgian listed companies that reported on the periodicity of the evaluation of the board of directors in FY 2013 (%)



	Regularly	Once every 2 to 3 years	Once every 4 years	Annually	Continuously
Periodicity of the evaluation process in the Belgian listed companies that reported on the periodicity of the evaluation of the board of directors in FY 2013 (%)	41%	43%	2%	9%	5%
Series 2					
Series 3					

Also, concerning the actual performance of the evaluation process, 34 out of the 78 (44%) Belgian listed companies studied reported when the evaluation was (or would be) conducted. This is a clear increase compared to the 2011 results, where only 28% indicated when the evaluation was (or would be) conducted. It is unclear whether the other companies (the remaining 56%) actually conducted an evaluation.[124]

Evaluation practices vary as to:

- the frequency of the evaluations;
- the formal manner in which evaluations are performed;
- the persons leading the evaluation exercise;
- whether or not an external advisor is involved; and
- the disclosure of the results.

All of the codes in the jurisdictions studied, as well as the G20/OECD Principles of Corporate Governance, **acknowledge the importance of evaluating the governing bodies/individuals in view of enhancing their performance**. However, not all codes cover this topic equally comprehensively. The German CG Code, for example, merely states that it is the

123 Guberna and VBO 2014 Report, p. 26-27.
124 Guberna and VBO 2014 Report, p. 27.

task of the supervisory board to examine the efficiency of its activities on a regular basis.

Whereas the German CG Code does not specify the frequency of the evaluations, the UK, Dutch and Swedish CG Codes recommend an annual evaluation process. **The Belgian 2009 Code and the French CG Code recommend a formal evaluation process at least once every (two to) three years and deviate in that respect from the 2005 Remuneration Recommendation, which recommends an annual review process.**

The Belgian 2009 Code and the French, UK, Dutch and Swedish CG Codes contain provisions on the manner in which evaluations should be performed. However, these provisions are rather general and do not refer to specific evaluation methods that can be used, such as questionnaires, one-on-one interviews, etc. The Belgian 2009 Code regards the use of an external facilitator as optional and the UK CG Code expressly recommends that, at least once every three years, the evaluation of the board of FTSE 350 companies should be externally facilitated.

The governing bodies/individual(s) responsible for leading the evaluation process often differ depending on who is being evaluated. The evaluation of the board is mostly the responsibility of the board itself (under the lead of the chairman).

Save for the German CG Code, all corporate governance codes studied recommend disclosing how the evaluation process has been carried out. However, **the Belgian 2009 Code and the UK and Swedish CG Codes do not expressly recommend that companies publicly disclose the extent to which the board's self-evaluation has led to any material change, as recommended in the 2005 Remuneration Recommendation.** Only the French CG Code and the Dutch CG Code expressly recommend that any steps that were taken as a result of the evaluation process should be disclosed in the annual report.

The UK CG Code and the Belgian 2009 Code expressly recommend that the chairman and the board respectively, should act on the results of the performance evaluation.

4.3 Availability/commitment of non-executive directors

(a) Introduction

Non-executive directors can only play their role of 'checking and balancing' management if they are able and committed to spending sufficient time preparing and attending board and committee meetings.

According to the 2005 Remuneration Recommendation, each director should devote the necessary time and attention required to his/her duties and should undertake to limit the number of his/her other professional commitments (in particular any directorships held in other companies) to such an extent that the proper performance of his/her duties is assured. The 2005 Remuneration Recommendation also states that if the appointment of a director is proposed, the director's other significant professional commitments should be disclosed. The board should be informed of subsequent changes, and every year the board should collect data on such commitments and make this information available in its annual report.[125]

This 2005 Remuneration Recommendation is not fully reflected in the Belgian 2009 Code, as the latter does not include the recommendation that companies should collect data on the other significant commitments of its directors and make this information available in their annual report.

According to the 2015 Guide to EU Corporate Governance, boards should take care to ensure that non-executive or independent directors have enough time available to devote to their function. This is particularly important for those chairing committees. The letter of appointment should therefore set out the expected time commitment. Non-executive or independent directors should ensure that they will have sufficient time to meet expectations. They should disclose to the board their other significant commitments before their appointment, and they should inform the board of subsequent changes. In general, service on too many boards can interfere with the performance of board members. Thus, companies should consider whether multiple board memberships by the same person are compatible with effective board performance.[126] Other company directorships should also be disclosed.[127]

125 Sections III.12.1 and 12.2 of Recommendation 2005/162/EC.
126 2015 Guide to EU Corporate Governance, p. 41.
127 2015 Guide to EU Corporate Governance, p. 22.

The availability and commitment of non-executive directors is a typical example of a topic where some code developers have been trying to translate a general behavioural principle (availability/commitment) into specific rules (a maximum number of mandates).

(b) Key figures

According to the 2014 H&S Study,[128] 11% of directors in those European listed companies studied have three or more non-executive directorships in public companies.

(c) Jurisdictions studied

According to the G20/OECD Principles of Corporate Governance, information on board members, including other company directorships, must be disclosed to investors. The G20/OECD Principles of Corporate Governance do not expressly limit the number of directorships or chairmanships that directors/individuals may hold in other companies.[129]

France

In accordance with principle 18 of the French CG Code, directors should give their duties the necessary time and attention required.

Therefore, an executive director should not hold more than two other directorships in listed corporations, including foreign corporations, not affiliated with his or her group.[130] He or she must also seek the opinion of the board of directors before accepting a new directorship in a listed corporation.

In the event that there is a separate chairman, the board of directors may draw up specific recommendations on this issue, taking into account the particular situation and the missions conferred on the chairman.

A non-executive director should not hold more than four other directorships in listed corporations, including foreign corporations, not affiliated with his or her group. This recommendation will apply at the time of appointment or the next renewal of his or her term of office.

It is further specified in provision 18.5 that directors should keep the board of directors informed of directorships held in other companies, including their participation on committees of the boards of these companies, both in France and abroad.

Germany

Since the revision in 2015, the German CG Code also refers to a general standard of commitment of directors in provision 5.4.1. According to this provision, the supervisory board should satisfy itself that the respective candidates are able to devote the expected amount of time when making proposals to the shareholders' meeting concerning the election of new members of the supervisory board. The new recommendation is intended above all to create greater transparency as regards the candidate and additional clarity for the supervisory board in terms of what can be expected from the candidates.[131]

Except for provision 5.4.2 of the German CG Code – stating that supervisory board members are not allowed to exercise directorships or similar positions or advisory tasks for important competitors of the enterprise – the German CG Code does not contain a specific provision limiting the number of directorships that may be held by directors in other (listed) companies.

Sweden

Similar to the German CG Code, the Swedish CG Code does not contain a specific provision limiting the number of directorships that may be held by directors in other (listed) companies. The Swedish CG Code suffices by stating that "directors are to devote the necessary time and care, and [...], to effectively safeguard and promote the interests of the company and its owners".[132].

The Netherlands

On the occasion of the 2016 revision of the Dutch CG Code, the limitation of the number of supervisory boards of Dutch listed companies of which an individual may be a member has been deleted, given that the same provision is also contained in article 2:142a (1) of the Dutch Company Code. The Dutch CG Code does stipulate in principle 2.4 that ' the management board and the supervisory board should spend sufficient time on their duties and responsibilities'.

128 2014 H&S Study, p. 27.
129 Principle V A.5 of the G20/OECD Principles of Corporate Governance.
130 Note that this limit above does not apply to directorships held by an executive director in subsidiaries and holdings, held alone or together with others, of companies whose main activity is to acquire and manage such holdings.
131 Press release Government Commission German CG Code 11 May 2015, p. 2.
132 Rule 5 of the Swedish CG Code.

United Kingdom

According to provision B.3. of the UK CG Code, all directors should be able to allocate sufficient time to the company to discharge their responsibilities effectively.

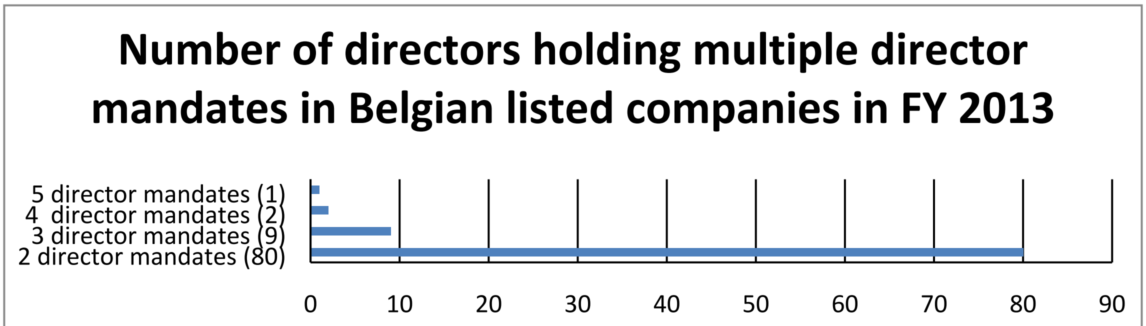
For the appointment of a chairman, the nomination committee should prepare a job specification, including an assessment of the time commitment expected, recognising the need for availability in the event of crises. A chairman's other significant commitments should be disclosed to the board before appointment and be included in the annual report. Changes to such commitments should be reported to the board as they arise, and their impact explained in the next annual report.[133]

Code provision B.3.2 of the UK CG Code furthermore states that the letter of appointment for non-executive directors should set out the expected time commitment. Non-executive directors should undertake that they will have sufficient time to meet what is expected of them. Their other significant commitments should be disclosed to the board before appointment, with a broad indication of the time involved, and the board should be informed of subsequent changes.[134]

The board of directors should not agree to a full-time executive director taking on more than one non-executive directorship in a FTSE 100 company or the chairmanship of such a company.[135]

In accordance with provision 4.5 of the Belgian 2009 Code, non-executive directors should be made aware of the extent of their duties at the time of their application, in particular as to the time commitment involved in carrying out those duties. They should not consider taking on more than five directorships in listed companies. Changes to their other relevant commitments and their new commitments outside the company should be reported to the chairman of the board as they arise. This provision is supplemented with a guideline stating that non-executive directors should undertake that they have sufficient time to meet expectations, taking into account the number and importance of their other commitments.

According to the Guberna and VBO 2014 Report[136], 80 out of 90 directors held 2 directorships in Belgian listed companies during financial year 2013, 9 directors out of 90 held 3 directorships and 2 out of 90 directors held 4 directorships. Only 1 director out of 90 holds 5 directorships. These numbers prove that compliance with the maximum number of directorships as set out in the Belgian 2009 Code is achievable.



	2 director mandates (80)	3 director mandates (9)	4 director mandates (2)	5 director mandates (1)
Number of directors holding multiple director mandates in Belgian listed companies in FY 2013	80	9	2	1
Series 2				
Series 3				

Source: Guberna and VBO 2014 Report, figure 2.3, p. 26

All of the codes in the jurisdictions studied refer to a **general standard of availability or commitment of directors**.

In the Belgian 2009 Code and the French and UK CG Codes this general provision is reflected in a provision limiting the number of directorships or chairmanships that directors/individuals may hold in other (listed) companies.

133 Provision B.3.1 of the UK CG Code.
134 Provision B.3.2 of the UK CG Code.
135 Provision B.3.3 of the UK CG Code.
136 Guberna and VBO 2014 Report, p. 26.

In addition, the Belgian 2009 Code and the UK and French CG Codes also contain the recommendation that **any changes to other relevant commitments/directorships and new commitments/directorships should be disclosed to the chairman or the board.** According to the G20/OECD Principles of Corporate Governance, information on board members, including other company directorships, must be disclosed to investors. Also, the 2005 Remuneration Recommendation states that every year the board should collect data on such commitments and make this information available in its annual report.

The 2005 Remuneration Recommendation is not fully reflected in the Belgian 2009 Code as the latter does not include the recommendation that companies should collect data on the other significant commitments of its directors and make such information available in their annual reports.

5. Principle 5: The board shall set up specialised committees

CURRENT TEXT OF THE BELGIAN 2009 CODE
5.1 The board should set up specialised committees to analyse specific issues and advise the board on those issues. The decision-making remains within the collegial responsibility of the board. The board should determine and disclose the terms of reference of each committee in the CG Charter. It should also detail the composition and operation of each committee in the CG Statement.
5.2 The board shall set up an audit committee in accordance with the Code on Companies. It should assist the board in fulfilling its monitoring responsibilities in respect of control in the broadest sense and follow the provisions set out in Appendix C.
5.3 The board should set up a nomination committee following the provisions set out in Appendix D.
5.4 The board should set up a remuneration committee following the provisions set out in Appendix E.
Guideline The nomination committee and the remuneration committee may be combined, provided that the combined committee satisfies the composition requirements for the remuneration committee.
5.5 The chairman of the board should ensure that the board appoints committee members and a chairman for each of those committees. Each committee is composed of at least three members. The appointments should not be for a term exceeding that of board membership.
Guideline In deciding on the specific composition of a committee, consideration should be given to the needs and qualifications required for the optimal functioning of that committee.
Guideline Each committee may invite any non-member to attend its meetings.
5.6 Board committees should be entitled to seek external professional advice at the company's expense after informing the chairman of the board.
5.7 After each committee meeting, the board should receive a report from each committee on its findings and recommendations.

5.1 Introduction – audit, remuneration and nomination committees

The EC has indicated that the supervisory role of non-executive directors is generally perceived as crucial in the nomination of directors, the remuneration of directors and audit. These are areas where there is a high potential risk of a conflict of interests of management, mainly when, according to national law, such matters are not the direct responsibility of shareholders but the board plays a role. Consequently, the EC has considered it appropriate to emphasise the key role of non-executive directors in these areas and encouraged the creation of board-level committees responsible for nomination, remuneration and audit.

In its 2005 Remuneration Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board, the EC recommends the establishment of a nomination, remuneration and audit committee in listed companies and allocates/recommends some common and specific characteristics (eg in terms of size, composition, role, operation, etc).[137]

The main purpose of these committees is to increase the efficiency of the board and to help organise the board's work to ensure that the decisions taken by the board are free of conflicts of interests.[138] However, this does not mean that the board is not allowed to delegate part of its decision-making powers to its committees when it considers this appropriate and when this is admissible under national law, even though the board remains fully responsible for the decisions taken in its field of competence. According to the EC, the board should determine the terms of reference of the committees. Consequently, any delegation of decision-making powers to the committees should be expressly declared, properly described and made public in a fully transparent manner.[139]

The majority of EU member states, including Belgium, encourage the creation of an audit, remuneration and nomination committee in their national codes. Moreover, the Belgian legislator decided to integrate the establishment of an audit and remuneration committee into Belgian company law, respectively in 2008 and 2010. As stated above in part 1, section 1.2,

137 Section II. 5 of the Recommendation 2005/162/EC.
138 Paragraph 10 and Section II, 6 of Recommendation 2005/162/EC.
139 Paragraph 10 and Section II, 6 of Recommendation 2005/162/EC.

this shift from soft law to hard law has been a common phenomenon in recent years. Subsequently, code developers are faced with the challenge of how to deal with this shift.

In accordance with Article 41 of Directive 2006/43/EC,[140] EU member states are expected to ensure that each public interest entity has an audit committee. In Belgium, this provision was implemented into Belgian law by the law of 17 December 2008,[141] which introduced article 526bis of the Company Law. In accordance with article 526bis of the Company Law, most large listed companies are required to create an audit committee within the board of directors.

The creation of a remuneration committee is not imposed by any Directive and is generally required on a 'comply or explain' basis.[142] However, in Belgium, such requirement is incorporated into the Company Law. By requiring the creation of a remuneration committee, the Belgian legislator, *inter alia*, wished to provide a solution for the lack of transparency over remuneration policies in listed companies.[143] The law of 6 April 2010[144] introduced article 526quater of the Company Law, according to which most large listed companies are required to create a remuneration committee.

As a result of Directive 2006/43/EC, most EU member states only incorporated the requirement to establish an audit committee into their hard law. Belgium is one of the few countries where the creation of a remuneration committee is also imposed by hard law. This makes Belgium a frontrunner in this area.

In line with the EC 2005 Remuneration Recommendation, the majority of the jurisdictions studied encourage the creation of an audit, remuneration and nomination committee in their codes. The French, UK, Dutch, and Swedish CG Codes expressly recommend that companies establish an audit, remuneration and nomination committee.

The wording of the codes as well as the regulatory technique applied reveal differences in the importance attached to the different committees. Some jurisdictions have addressed issues where conflict of interests may arise in a different way than that proposed in the EC's 2005 Remuneration Recommendation. In Sweden, for example, the nomination committee is not a body of the board, but a drafting body for the shareholders' meeting. The shareholders' meeting will either appoint members of the nomination committee or specify how they are to be appointed.[145]

The creation of a nomination committee is incorporated into all the corporate governance codes of the jurisdictions studied.[146] Contrary to the creation of an audit and remuneration committee, the establishment of a nomination committee is not imposed in Belgium by the Company Law.

Given that the audit and remuneration committees are already prescribed in Belgium by the Company Law, it might be useful to eliminate or change specific provisions that overlap with the current legislation. The Swedish CG Code serves as a good example in this regard, by simply referring to the relevant legislative provisions. In that way, the Belgian 2009 Code can focus on other guidelines that go beyond any European or national legislation, such as the possibility of creating other specialised committees, aside from the 'traditional' committees (*see infra*). In particular, the following sections of the code could be deleted:

The Belgian 2009 Code	Hard law
5.2 The board shall set up an audit committee in accordance with the Code on Companies. It should assist the board in fulfilling its monitoring responsibilities in respect of control in the broadest sense and follow the provisions set out in Appendix C.	Article 526bis, §1 of the Company Law
5.2/1 The board shall set up an audit committee composed exclusively of non-executive directors. (cfr. art.	Article 526bis, §2 of the Company Law

140 Directive 2006/43/EC of the European Parliament and of the Council on statutory audits of annual accounts and consolidated accounts. This directive was amended by Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts with EEA relevance.
141 Law of 17 December 2008 regarding the creation of an audit committee in listed companies and financial companies, *BS* 29 December 2008.
142 EC Staff Working Document, *Report on the application by the Member States of the EU of the Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board of 13 July 2007*, p. 8.
143 *Parl.St. Kamer*, Doc. 52 2336/001, p. 5.
144 Law of 6 April 2010 on the reinforcement of corporate governance in listed companies, *BS* 23 April 2010.
145 EC Staff Working Document, *Report on the application by the Member States of the EU of the Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board of 13 July 2007*, page 8; R. Skog and E. Sjöman, "Corporate boards in Sweden" in P. Davies, P.L. Davies, J. Klaus ea. (eds.), *Corporate Boards in European Law: A comparative analysis*, Oxford, 2013, 633; Principle 2 of the Swedish CG Code.
146 European Commission Staff Working Document, *Report on the application by the Member States of the EU of the Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board of 13 July 2007*, page 8.

526bis, §1-2 CoC).	
5.2/2 Those companies who meet the requirements of article 526bis, §3 CoC may permit the functions assigned to the audit committee to be performed by the board as a whole, provided that if the chairman of the board is an executive member he shall not chair the board operating as audit committee. (art. 526bis, §3 CoC).	Article 526bis, §3 of the Company Law
5.2/6 Without prejudice to the legal responsibilities of the board, the audit committee shall have at least the following roles: – monitoring the financial reporting process; – monitoring the effectiveness of the company's internal control and risk management systems; – if there is an internal audit, monitoring the internal audit and its effectiveness; – monitoring the statutory audit (*wettelijke controle/contrôle legal*) of the annual and consolidated accounts, including any follow-up on any questions and recommendations made by the external auditor; and – reviewing and monitoring the independence of the external auditor, in particular regarding the provision of additional services to the company. (art. 526bis, al.1er §4a-e CoC).	Article 526bis, §4, a)-e) of the Company Law
5.2/8 The audit committee shall report regularly to the board on the exercise of its duties, and at least when the board sets up the annual accounts, the consolidated accounts, and where applicable the condensed financial statements intended for publication. (art. 526bis, §4, al.2 CoC).	Article 526bis, §4 of the Company Law
5.2/22 The external auditor shall: – annually confirm, in writing, to the audit committee, its independence from the company; – annually inform the audit committee about the additional services provided to the company; – examine with the audit committee the risks relating to its independence and the safety measures taken to decrease these risks as documented by him. (art. 526bis, §6 CoC).	Article 526bis, §6 of the Company Law
5.2/25 Without prejudice to the legal provisions, which require that the statutory auditor provides reports or warnings to the administrative bodies of the company, the external auditor shall report to the audit committee, on the key matters arising from the statutory audit of the annual accounts, and in particular on material weaknesses in internal control in relation to the financial reporting process. (art. 526bis, §5 CoC).	Article 526bis, §5 of the Company Law
5.4 The board should set up a remuneration committee following the provisions set out in Appendix E.	Article 526quater, §1 of the Company Law
5.4/1 The board should set up a remuneration	Article 526quater, §2 and §3 of the Company Law

committee composed exclusively of non-executive directors. At least a majority of its members should be independent. The chairman or another non-executive director should chair the committee.	
5.4/2 The remuneration committee should make proposals to the board on the remuneration policy for non-executive directors and executive managers, as well as, where appropriate, on the resulting proposals to be submitted by the board to the shareholders.	Article 526quater, §5, a) of the Company Law
5.4/3 The remuneration committee should make proposals to the board regarding the remuneration of directors and executive managers, including variable remuneration and long-term incentives, whether or not stock-related, in the form of stock options or other financial instruments, and regarding the arrangements on early termination, and where applicable, on the resulting proposals to be submitted by the board to the shareholders.	Article 526quater, §5, b) of the Company Law
5.4/4 The remuneration committee should submit a remuneration report to the board.	Article 526quater, §5, c), d) of the Company Law
5.4/5 The remuneration committee should meet at least twice a year and whenever it deems it necessary in order to carry out its duties.	Article 526quater, §6 of the Company Law
5.4/6 The remuneration committee should report regularly to the board on the exercise of its duties.	Article 526quater, §6 of the Company Law
5.4/7 The CEO should participate to the meetings of the remuneration committee where the committee deals with the remuneration of other executive managers.	Article 526quater, §7 of the Company Law

5.2 Other specialised committees

We have observed a tendency in certain codes that fall outside the scope of this study (eg the Italian and the Singapore corporate governance codes) to grant companies the option of establishing a separate committee at board level in the area of risk management. In the United Kingdom, all companies can choose to have risk management committees if they want to and "significant firms" are required to have such committees under the Capital Requirements Directive IV.

The Italian corporate governance code foresees the creation of board committees, including an internal control committee, which informs the board of directors on the definition of the guidelines of the internal control and risk management systems; the evaluation of the adequacy of the internal control and risk management systems; the description of the main features of the internal control and risk management systems in the corporate governance report and the approval of the plan drafted by the person in charge of the internal audit. In addition, this committee also assists the board of directors by, among other things, evaluating the correct application of the accounting principles as well as their consistency for the purpose of the preparation of the consolidated financial statements. However, it must be emphasised that the role of the committee is different from the role of the board of auditors, which is a 'control committee' vis-à-vis the auditors.[147] The Singaporean corporate governance code also allows for the creation of a separate board risk committee.[148]

Assigning the role of risk management to a board-level committee is becoming more common in large companies, notably in the financial sector. Such a separate committee (be it a stand-alone risk committee, a combined risk committee with other roles such as nomination and governance, strategy etc) can be an effective mechanism to facilitate transparency, where justified by the size of the company and its board, and offer the focus and independent judgement needed to oversee

[147] G. Ferrarini, G.G. Peruzzo and M. Roberti "Corporate boards in Sweden" in P. Davies, P.L. Davies, J. Klaus ea. (eds.), *Corporate Boards in European Law: A comparative analysis*, Oxford, 2013, 386; Principle 7.C.1 and 7.C.2. of the Italian 2015 Corporate Governance Code.

[148] Principle 11.4 of the Singapore 2012 corporate governance code.

the company's risk management approach. In addition, the use of a risk committee could lessen the workload of the board and help to avoid audit committee overload.[149]

Aside from the 'traditional' audit, remuneration and nomination committees, the Company Law also allows for the creation of other specialised committees within the board of directors. Some Belgian listed companies also establish additional specialised committees, such as a strategic committee, a financial committee and/or an investment committee within their board of directors. According to the Guberna and VBO 2014 Report[150], 11 out of 78 listed companies (14%) had established a strategic committee.

Belgium is well positioned with respect to the rules on the establishment and functioning of the audit, remuneration and nomination committees. It has gone beyond what many of the other jurisdictions require, by imposing a legal requirement (hard law) to establish a remuneration committee and prescribing its composition. Some codes recommend the establishment of other committees (eg risk committee) but this practice is not well established.

[149] By way of example, we have noted that the Russian corporate governance code goes even further by also encouraging companies to create a strategy committee, a corporate governance committee, an ethics committee, a budget committee or a committee on health, security and environment, etc depending on the scope of the company's activities and the risk level.

[150] Guberna and Het Verbond van Belgische Ondernemingen (VBO), *Onderzoeksrapport Naleving van de Belgische Corporate Governance Code 2009 bij de Bel 20, Bel Mid en Bel Small ondernemingen. Jaarverslagen 2014*, page 28.

6. Principle 6 – The company shall define a clear executive management structure

CURRENT TEXT OF THE BELGIAN 2009 CODE
6.1 The board should determine, in close consultation with the CEO, the terms of reference of the executive management detailing its responsibilities, duties, powers, composition and operation. These terms should be disclosed in the CG Charter. *6.2 The executive management should include, at least, all executive directors. If a management committee exists, the executive management should also include all members of that committee, irrespective of whether the committee has been established within the scope of article 524bis CoC (legal management committee). A list of the members of the executive management should be disclosed in the CG Statement.* *6.3 The nomination committee should assist the board on the nomination and succession planning of the CEO and the other members of the executive management, unless otherwise decided by the board.* *6.4 The board should empower the executive management to enable it to perform its responsibilities and duties. Taking into account the company's values, its risk appetite and key policies, the executive management should have sufficient latitude to propose and implement corporate strategy.* *6.5 The executive management should at least:* • *be entrusted with the running of the company;* • *put internal controls in place (ie systems to identify, assess, manage and monitor financial and other risks) without prejudice to the board's monitoring role, based on the framework approved by the board;* • *present to the board a complete, timely, reliable and accurate preparation of the company's financial statements, in accordance with the applicable accounting standards and policies of the company;* • *prepare the company's required disclosure of the financial statements and other material financial and non-financial information;* • *present the board with a balanced and understandable assessment of the company's financial situation;* • *provide the board in due time with all information necessary for the board to carry out its duties;* • *be responsible and accountable to the board for the discharge of its responsibilities.* *6.6 Clear procedures should exist for:* • *proposals from the executive management for decisions to be taken by the board;* • *the decision-making by the executive management;* • *the reporting to the board of key decisions taken by the executive management;* • *the evaluation of the CEO and other members of the executive management.* *These procedures should be reviewed and adjusted, if required, to ensure the effective exercise by the board and the executive management of their respective powers and duties.* *Guideline The powers to represent the company solely or jointly and the extent of, and limitations on, those powers shall be clearly defined, taking into account the way in which the board has entrusted the executive management with the running of the company and the relevant provisions of the Code on Companies. All those concerned should be fully acquainted with the scope of those powers.* *6.7 Each member of the executive management should arrange his personal and business affairs so as to avoid direct and indirect conflicts of interest with the company. Transactions between the company and its executive managers should take place at arms' length.* *6.8 The policy established by the board according to Provision 3.6 should also address transactions or other contractual relationships between the company, including its related companies, and its executive managers.*

Reference is made to the findings under Principle 1: The company shall adopt a clear governance structure.

7. Principle 7: The company shall remunerate directors and executive managers fairly and responsibly

CURRENT TEXT OF THE BELGIAN 2009 CODE
7.1 Levels of remuneration should be sufficient to attract, retain and motivate directors and executive managers who have the profile determined by the board. *7.2 The company should set up a remuneration report. This remuneration report should form a well- defined part of the CG Statement.* *7.3 The company should disclose in its remuneration report: a description of its internal procedure for developing (i) a remuneration policy for non-executive directors and executive managers and (ii) for setting the level of remuneration for non-executive directors and executive managers.* *7.4 The company should also disclose in its remuneration report, a statement of the adopted remuneration policy for the executive managers. Any significant changes to this remuneration policy occurred since the end of the financial reported year should be explicitly emphasized in the remuneration report.* *7.5 An individual should not decide his own remuneration.* *Non-executive directors' remuneration* *7.6 The remuneration of non-executive directors should take into account their role as ordinary board members, and specific roles, as chairman of the board, chairman or member of board committees, as well as their resulting responsibilities and commitment in time.* *7.7 Non-executive directors should not be entitled to performance-related remuneration such as bonuses, stock related long-term incentive schemes, fringe benefits or pension benefits.* *7.8 The amount of the remuneration and other benefits granted directly or indirectly to non-executive directors, by the company or its subsidiaries should be disclosed, on an individual basis, in the remuneration report.* *Executive directors' & executive managers' remuneration* *7.9 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.* *7.10 If an executive manager is also a member of the board, information on the amount of remuneration he receives in such capacity should be disclosed in the remuneration report.* *7.11 An appropriate proportion of an executive manager's remuneration package should be structured so as to link rewards to corporate and individual performance, thereby aligning the executive managers' interests with the interests of the company and its shareholders.* *7.12 Where executive managers are eligible for incentives based on the performance of the company or its subsidiaries, the criteria for the evaluation of performance achieved against targets as well as the term of evaluation should be disclosed in the remuneration report. This information should be provided in such a way that it does not disclose any confidential information regarding the company's strategy.* *7.13 Schemes under which executive managers are remunerated in shares, share options or any other right to acquire shares should be subject to prior shareholder approval by way of a resolution at the general shareholders' meeting. The approval should relate to the scheme itself and not to the grant of share-based benefits under the scheme to individuals.* *Guideline As a rule, shares should not vest and options should not be exercisable within less than three years.* *7.14 The amount of the remuneration and other benefits granted directly or indirectly to the CEO, by the company or its subsidiaries should be disclosed in the remuneration report. This information should be disclosed, providing a split between:* *(a) basic remuneration;* *(b) variable remuneration: for all incentives indicating the form in which this variable remuneration is paid;* *(c) pension: the amounts paid during the financial reported year with an explanation of the applicable pension schemes; and* *(d) other components of the remuneration, such as the cost or monetary value of insurance coverage and fringe benefits, with an explanation of the details of the main components.*

If the company has materially deviated from its remuneration policy during the financial reported year, it should be explained in the remuneration report.

7.15 The amount of the remuneration and other benefits granted directly or indirectly to other members of the executive management, by the company or its subsidiaries should be disclosed on a global basis, in the remuneration report. This information should be disclosed, providing a split between:

(a) basic remuneration;

(b) variable remuneration: for all incentives indicating the form in which this variable remuneration is paid;

(c) pension: the amounts paid during the financial reported year with an explanation of the applicable pension schemes; and

(d) other components of the remuneration, such as the cost or monetary value of insurance coverage and fringe benefits, with an explanation of the details of the main components.

If the company has materially deviated from its remuneration policy during the financial reported year, it should be explained in the remuneration report.

7.16 For the CEO and the other executive managers, the remuneration report should disclose, on an individual basis, the number and key features of shares, share options or any other rights to acquire shares, granted, exercised or lapsed during the financial reported year.

Contract of the CEO and the other executive managers

7.17 The board should approve the contracts for the appointment of the CEO and other executive managers further to the advice of the remuneration committee. The contracts made on or after 1 July 2009 should refer to the criteria to be taken into account when determining variable remuneration. The contract should contain specific provisions relating to early termination.

Severance pay

7.18 Any contractual arrangement made with the company or its subsidiaries on or after 1 July 2009 concerning the remuneration of the CEO or any other executive manager should specify that severance pay awarded in the event of early termination should not exceed 12 months' basic and variable remuneration.

The board may consider higher severance pay further to a recommendation by the remuneration committee. Such higher severance pay should be limited to a maximum of 18 months' basic and variable remuneration. The contract should specify when such higher severance pay may be paid. The board should justify this higher severance pay in the remuneration report.

Guideline Basic remuneration component should be based on the monthly remuneration paid the last month before termination. Variable remuneration component should be contractually determined. It should be based on variable compensation effectively paid during the contract. It could, for instance, refer to the previous year's variable remuneration or to the mean value of the variable remuneration paid over a specific number of previous years.

Guideline Examples of when a higher severance pay could be paid include: departure because of a merger, a change of control or a change of strategy; existing termination rights within the company; the candidate's years of service in his previous position; necessary condition for obtaining the candidate's agreement.

The contract should specify that the severance package should neither take account of variable remuneration nor exceed 12 months' basic remuneration if the departing CEO or executive manager did not meet the performance criteria referred to in the contract.

7.1 Topics for change – introduction

The conflict of interests between shareholders and directors or management, also known as the agency issue (see also part 2, section 1.1), can partially be mitigated by linking a company's results with directors and managers' remuneration in order to align their interests, with a view to maximising longer-term shareholders' value. Also, transparency over remuneration should result in more informed shareholders, more conscious decision-making on remuneration and more accountability towards the shareholders and investors.

The financial and economic crisis has placed directors' remuneration right in the centre of the corporate governance debate and resulted in an extensive and rapid evolution of this topic. Shortcomings in the application of the corporate governance codes and their 'comply or explain' mechanism have only enhanced support for European regulation in this respect.

The combination of public pressure and growing European regulation on the topic has resulted in enhanced and more detailed soft law as well as a shift from soft law to hard law.

This prominent shift to hard law in Belgium (see below) and in other European countries complicates the comparison between the different corporate governance codes. As the code provisions are finding their way into hard law, some countries prefer to remove the old sections from their codes, while others leave these provisions in the code to provide a more comprehensive overview. Therefore, it is particularly difficult to make a comprehensive/all-embracing comparison of this principle.

7.2 Relevance of code provisions – transition from soft to hard law

As stated in part 1 section 1.2, the shift from soft to hard law is most pronounced in the area of remuneration, where most of the provisions included in the Belgian 2009 Code have now been included in the Company Law (see below). The law of 6 April 2010 on the reinforcement of listed companies (whose provisions were inspired by the Remuneration Recommendations and the Belgian 2009 Code) enabled this migration into hard law. It turned Belgium into a frontrunner in this area, by providing legal enforceability for the majority of its remuneration provisions.

The table below provides an overview of the provisions on remuneration transferred into hard law, including the new provisions that are not included in the Belgian 2009 Code.

Belgian 2009 Code	Hard law
7.2 The company should set up a remuneration report. This remuneration report should form a well-defined part of the CG Statement.	Article 96 §3, 1st paragraph of the Company Law
7.3 The company should disclose in its remuneration report: a description of its internal procedure for developing (i) a remuneration policy for non-executive directors and executive managers and (ii) for setting the level of remuneration for non-executive directors and executive managers.	Article 96 §3, 2nd paragraph, 1° of the Company Law
7.4 The company should also disclose in its remuneration report a statement of the adopted remuneration policy for the executive managers. Any significant changes to this remuneration policy that occurred since the end of the financial reported year should be explicitly emphasised in the remuneration report.	Article 96 §3, 2nd paragraph, 2° of the Company Law
7.7 Non-executive directors should not be entitled to performance-related remuneration such as bonuses, stock related long-term incentive schemes, fringe benefits or pension benefits.	Article 554, 7th paragraph of the Company Law Note: Possible deviation from Company Law after prior approval of shareholders.
7.8 The amount of the remuneration and other benefits granted directly or indirectly to non-executive directors, by the company or its subsidiaries, should be disclosed, on an individual basis, in the remuneration report.	Article 96 §3, 2nd paragraph, 3° of the Company Law
7.10 If an executive manager is also a member of the board, information on the amount of remuneration he receives in such capacity should be disclosed in the remuneration report.	Article 96 §3, 2nd paragraph, 4° of the Company Law
7.12 Where executive managers are eligible for incentives based on the performance of the company or its subsidiaries, the criteria for the evaluation of performance achieved against targets as well as the term of evaluation should be disclosed in the remuneration report. This information should be provided in such a way that it does not disclose any confidential information regarding the	Article 96 §3, 2nd paragraph, 5° of the Company Law

company's strategy.	
7.13 Schemes under which executive managers are remunerated in shares, share options or any other right to acquire shares should be subject to prior shareholder approval by way of a resolution at the general shareholders' meeting. The approval should relate to the scheme itself and not to the grant of share-based benefits under the scheme to individuals. **Guideline** As a rule, shares should not vest and options should not be exercisable within less than three years.	Article 520ter, 1st paragraph of the Company Law
7.14 The amount of the remuneration and other benefits granted directly or indirectly to the CEO, by the company or its subsidiaries, should be disclosed in the remuneration report. This information should be disclosed, providing a split between: (i) basic remuneration; (ii) variable remuneration: for all incentives indicating the form in which this variable remuneration is paid; (iii) pension: the amounts paid during the financial reported year with an explanation of the applicable pension schemes; and (iv) other components of the remuneration, such as the cost or monetary value of insurance coverage and fringe benefits, with an explanation of the details of the main components. If the company has materially deviated from its remuneration policy during the financial reported year, it should be explained in the remuneration report.	Article 96 §3, 2nd paragraph, 6° of the Company Law
7.15 The amount of the remuneration and other benefits granted directly or indirectly to other members of the executive management, by the company or its subsidiaries should be disclosed on a global basis, in the remuneration report. This information should be disclosed, providing a split between: (i) basic remuneration; (ii) variable remuneration: for all incentives indicating the form in which this variable remuneration is paid; (iii) pension: the amounts paid during the financial reported year with an explanation of the applicable pension schemes; and (iv) other components of the remuneration, such as the cost or monetary value of insurance coverage and fringe benefits, with an explanation of the details of the main components. If the company has materially deviated from its	Article 96 §3, 2nd paragraph, 7° of the Company Law

remuneration policy during the financial reported year, it should be explained in the remuneration report.	
7.16 For the CEO and the other executive managers, the remuneration report should disclose, on an individual basis, the number and key features of shares, share options or any other rights to acquire shares, granted, exercised or lapsed during the financial reported year.	Article 96 §3, 2nd paragraph, 8° of the Company Law
7.18 Any contractual arrangement made with the company or its subsidiaries on or after 1 July 2009 concerning the remuneration of the CEO or any other executive manager should specify that severance pay awarded in the event of early termination should not exceed 12 months' basic and variable remuneration. The board may consider higher severance pay further to a recommendation by the remuneration committee. Such higher severance pay should be limited to a maximum of 18 months' basic and variable remuneration. The contract should specify when such higher severance pay may be paid. The board should justify this higher severance pay in the remuneration report. **Guideline** Basic remuneration component should be based on the monthly remuneration paid the last month before termination. Variable remuneration component should be contractually determined. It should be based on variable compensation effectively paid during the contract. It could, for instance, refer to the previous year's variable remuneration or to the mean value of the variable remuneration paid over a specific number of previous years. **Guideline** Examples of when a higher severance pay could be paid, include: departure due to a merger, a change of control or a change of strategy; existing termination rights within the company; the candidate's years of service in his previous position; necessary condition for obtaining the candidate's agreement. The contract should specify that the severance package should neither take account of variable remuneration nor exceed 12 months' basic remuneration if the departing CEO or executive manager did not meet the performance criteria referred to in the contract.	Article 554 of the Company Law

Hard law for which there is no provision in the Belgian 2009 Code
Article 96 § 3 Company Law For the companies whose shares are admitted to trading on a market referred to in Article 4, the corporate governance declaration referred to in §2 must also include a remuneration report constituting a specific part thereof. Such remuneration report must contain at least the following information: (…) **9°** for each of the executive directors, members of the management committee, other executives and persons in charge

of the daily management, the provisions on their severance payments; **10°** in the case of departure of the executive directors, members of the management committee, other executives and persons in charge of the daily management, the justification and decision of the board of directors, on proposal of the remuneration committee, whether they are eligible to receive severance payments and the calculation base for such payments; **11°** for executive directors, members of the management committee, other executives and persons in charge of the daily management, the extent to which a recovery right is granted to the company concerning variable remuneration granted on the basis of incorrect financial information.
Article 520bis of the Company Law In companies whose shares are admitted to trading on a market referred to in Article 4, the criteria rendering the granting of variable remuneration to an executive director must be expressly included in the contractual or other provisions governing the relevant legal relationship. Such variable remuneration may only be paid if the criteria have been met for the indicated period. If the previous subparagraphs are not complied with, such variable remuneration must not be taken into account when calculating the severance payment.
Article 520ter of the Company Law (…) Save for contrary provisions in the articles of association or the express approval of the general meeting of shareholders, at least one-quarter of the variable remuneration of an executive director in a company whose shares are admitted to trading on a market referred to in Article 4 must be based on performance criteria established in advance and objectively measurable over a period of at least two years, and another quarter must be based on performance criteria established in advance and objectively measurable over a period of at least three years. The obligation set out in the previous subparagraph will not apply if the variable remuneration concerns one-quarter or less of the annual remuneration. For the purposes of the previous subparagraph, 'annual remuneration' refers to all elements whose publication is required pursuant to Article 96, §3, 6° and 7°.

Following the European Action Plan of 2003,[151] Remuneration Recommendations 2004/913/EG and 2009/385/EG and Directive 2006/46/EG[152] and the law of 6 April 2010 on the reinforcement of listed companies, it was inevitable that these instruments would become part of Belgian law. However, it is important to note that the Belgian legislator included more extensive provisions than those required under Directive 2006/46/EG (which mainly prescribed disclosure requirements). In addition to the disclosure requirements for remuneration and the obligation to publish a corporate governance declaration, the law of 6 April 2010 also introduced regulations on (the cap on) severance pay, obligatory deferral of the payment of certain variable remuneration and on the link between remuneration and long-term results. These restrictions are drafted as a "say on pay": it is possible to derogate from these best practice terms if such derogation is submitted for approval to shareholders. This extensive shift to hard law leads us to conclude that Belgium, under European influence and on its own initiative, already provides for (hard) rules/regulations for most of those factors affecting remuneration.

By way of example, we have identified a number of topics where certain other jurisdictions go beyond what is currently contained in the Belgian 2009 Code and Company Law with respect to remuneration.

[151] Communication from the EC to the Council and the European Parliament, *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*, COM(2003)284.
[152] The 2005 Remuneration Recommendation focused on the incorporation of an audit and remuneration committee.

7.3 Claw back

Recommendation 2009/385/EG states that "*contractual arrangements with executive or managing directors should include provisions that permit the company to reclaim variable components of remuneration that were awarded on the basis of data which subsequently proved to be manifestly misstated*".[153]

By way of example:

– in the United Kingdom, a provision on claw back has been included under section D.1.1. of the UK CG Code: "*Schemes should include provisions that would enable the company to recover sums paid or withhold the payment of any sum, and specify the circumstances in which it would be appropriate to do so*"; and
– in the Netherlands, a claw back provision was inserted into hard law[154] following the implementation of Recommendation 2009/385/EC. The suggestion of the Dutch CG Committee to introduce a provision stating that the remuneration policy must specify the parameters for claw back of variable remuneration has not been implemented in the most recent revision of the Dutch CG Code.

A claw back provision has not been introduced in all of the jurisdictions studied. No claw back provision has been included for Belgium in the Company Law given that the legislator did not wish to intervene in the contractual relationship between the company and its directors on this point,[155] but article 96 §3, 2nd paragraph, 11° of the Company Law (see above) did introduce the obligation to disclose such a contractual provision if it has been included. The Shareholders' Rights Directive also introduced the requirement that the remuneration report must include information on the use of the possibility to reclaim variable remuneration from each individual director's remuneration.

As the main findings of the EC's report on the implementation by the EU member states of the Remuneration Recommendations[156] show, Belgium is a frontrunner when it comes to implementing remuneration regulations, with the sole exception being the claw back provision.

7.4 Standardisation

Effective shareholder engagement is one of the cornerstones of a company's corporate governance model and the standardised presentation of certain information on remuneration may be one of the means to achieve this end.

Consolidating and standardising the manner in which data is presented will provide a better overview and improve comparability.

In the 2009 Remuneration Recommendation, the EC has already recommended more generally that the remuneration policy should be clear and easily understandable. This concern is repeated in the EC's report on the implementation by the member states of the Remuneration Recommendations, which forms part of the 2012 Action Plan and subsequently in the Shareholders' Rights Directive, the need for clear and understandable comprehensive and comparable information on remuneration policies and the individual remuneration of directors is translated into a concrete step towards standardisation following article 9a, paragraph 6 of the Shareholders' Rights Directive.[157]

Some EU member states have already issued a standard template for disclosure.[158] The German Corporate Governance Commission, for instance, has introduced a standardised form "*in order to improve comparability over time and with other companies, both for the supervisory board and for the general public, [we] recommend that important facts and figures on management board remuneration be prepared in a standardised fashion and that use be made of the tables that have been proposed by it*". Furthermore, in the French CG Code a recommendation recommends that the chapter in the annual report informing the shareholders of the compensation received by the company officers should follow a standard form (attached to the French CG Code as an annex). In the United Kingdom, statutory regulations applicable to listed companies set out the information that must be disclosed in the annual directors' remuneration report and the remuneration policy, including the prescribed format in which certain information should be displayed.[159]

153 See 3.4 of Recommendation 2009/385/EG.
154 See article 135, §8 of Book 2 of the Dutch Civil Code.
155 Memorie van Toelichting (DOC 52 2336/01).
156 COM(2010)285.
157 *The remuneration policy shall contribute to the company's business strategy and long-term interests and sustainability and shall explain how it does so. It shall be clear and understandable and describe the different components of fixed and variable remuneration, including all bonuses and other benefits in whatever form, which can be awarded to directors and indicate their relative proportion.*
158 COM (2010) 285.
159 Schedule 8, the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008.

The CGC has published "*Application guidelines for remuneration reporting*"[160] in order to provide companies with a framework they can use to comply with the transparency requirements on remuneration imposed by the Company Law. The document provided by the CGC could serve as a starting point to be updated in accordance with the French and German templates already available.

7.5 "Say on pay"

Under the heading "say on pay", one can visualise a number of initiatives in view of structuring and monitoring decisions on (non-)executive remuneration, such as the function(ing) of the remuneration committee, the disclosure requirements in the remuneration report and the regulation of the structuring and deferred payment of variable remuneration. However, the *sensu stricto* definition of "say on pay" is limited to the shareholders' approval of the remuneration policy as a whole and/or its different elements of remuneration of (non-)executive directors and executives.

In addition to the votes on the remuneration policy and remuneration report as a whole, it is also possible to provide for a shareholder vote on specific components of the remuneration policy, for example, as provided for under Belgian law: on share-based remuneration when granted in the short term,[161] on variable remuneration when granted to a non-executive director[162] or when granting a severance pay equivalent to more than 18 months' remuneration.[163]

Other components subject to shareholder approval in other EU member states are: the fixed part of the remuneration, preferred shares, the "golden hello", non-compete payments or pensions.

Different approaches may be taken with respect to the vote of shareholders at the general meeting:

- the nature of the vote could be advisory or binding;
- the frequency and timing of the vote could be *ex ante* or *ex post*; and
- the comprehensiveness and trigger for the shareholders' vote, including only a vote on the remuneration policy as a whole or also on the different elements of the remuneration policy.

In the EC's report on the implementation by the member states of the Remuneration Recommendations[164] it is stated that only a minority of EU member states have a recommendation or legislative provision which promotes shareholder voting on remuneration policies.

In the context of shareholder engagement, in the 2012 Action Plan the "say on pay" discussion was recommenced. The EC notes that, to enable shareholders to take corrective action, shareholders should be able to express their views on the matter through a mandatory shareholder vote on the company's remuneration policy and the remuneration report.

In line with this, the Shareholders' Right Directive introduces a right for shareholders to vote on the remuneration policy that would require EU member states to ensure, *inter alia*, that:

- the vote by the shareholders at the general meeting on the remuneration policy is binding and companies may only pay remuneration to their directors in accordance with the remuneration policy approved by the general meeting. However, EU member states may provide that the vote at the general meeting on the remuneration policy is advisory (in which case companies must pay remuneration to their directors only in accordance with a remuneration policy that has been submitted to such vote at the general meeting, and where the general meeting rejects the proposed remuneration policy, the company must submit a revised policy to a vote at the following general meeting); and
- companies submit the remuneration policy to a vote by the general meeting on every material change and in any case at least every four years.

According to the Shareholders' Right Directive, where an approved remuneration policy exists and the general meeting does not approve the proposed new policy, the company would have to continue to pay remuneration to its directors in accordance with the existing approved policy and would have to submit a revised policy for approval by shareholders at the following general meeting.

Under Dutch law, a negative shareholders' vote on the remuneration policy results in a sanction, which is the application of the previous remuneration policy. Indeed, if the company wishes to make changes to the remuneration policy, these

160 http://www.corporategovernancecommittee.be/en/explanatory-notes/remuneration-reporting
161 See art. 520ter of the Company Law.
162 See art. 554 of the Company Law.
163 See art. 554 of the Company Law.
164 See Commission Report COM(2010) 285 final, p.5 and 8. Available at: http://ec.europa.eu/internal_market/company/docs/directors-remun/com-2010-285-2_en.pdf

changes must be approved by the general meeting of shareholders. Under Dutch law currently no obligation exists to require a shareholders vote on the policy once every four years.

In France, the shareholders' vote on the officers' compensation of listed French companies (fixed, variable and exceptional elements) has shifted from soft law to hard law since the enactment of the French Law named "Loi Sapin II", on 8 November 2016. The general meeting must now approve 'ex ante' the compensation policy as defined in a report to be prepared by the board and submitted to shareholders (describing the principles and criteria for determining, allocating and granting fixed, variable and exceptional elements making up the total compensation and benefits of any kind granted to corporate officers). A negative shareholders' vote on the remuneration policy prevents the implementation of the new policy and results automatically in the application of the remuneration policy then in place). The shareholders shall also vote 'ex post' on the granting of compensation and benefits to each officer for the previous financial year, set out in accordance with the policy previously adopted. In the event of a vote against a resolution (one resolution for each officer being required), the paid fixed element remains effective but the variable elements may not be paid. The legal provisions relating to the 'ex-ante' vote apply as from the ordinary general meeting deciding on the first financial ended after the promulgation of the law (2017 meetings) and the 'ex post' vote will apply as from the closing of the financial year following the first financial year ended after the promulgation of the law (2018 meeting).

For the 2017 meetings, in accordance with the French CG Code, the board must present the compensation of company officers at the annual general meeting. This presentation is followed by a mandatory shareholders' vote (although, by definition, such vote is not being legally binding as it is embedded in soft law), and if the general meeting of shareholders issues a negative opinion, the board must meet within a reasonable period and examine the reasons for this vote and the expectations expressed by the shareholders. Following this consultation, and on the recommendations of the compensation committee, the board will rule on the modifications to be made to the compensation due or awarded in respect of the closed financial year or the future compensation policy. It must then immediately publish information on the company's website indicating how it has responded to the shareholders' vote and report on this at the next shareholders' meeting.[165]

In the United Kingdom, the law requires an annual advisory vote on the remuneration report and a binding vote on the remuneration policy at least every three years. If the annual advisory vote on the remuneration report is rejected by shareholders, the company is required to have a (binding) vote on the remuneration policy in the following year, even if less than three years have elapsed since the previous vote. In addition, if any resolution submitted to shareholders receives a significant vote against, a company should publish a statement detailing the actions it intends to take to understand the reason behind the result and how it will engage with shareholders when a significant percentage of them has voted against any resolution.

Article 554 of the Company Law already provides for an annual advisory vote on the remuneration report in Belgium, which means that disapproval does not oblige the company to revise any contractual engagements, nor does it affect the validity of the company's financial statements. However, the reason behind this legislation is that, if the shareholders do not approve the remuneration report, the board of directors is likely to revise the company's remuneration policy.[166]

7.6 Limitation of excessive remuneration

(a) (Disclosure of) wage gap

The first draft of the proposal for the Shareholders' Rights Directive contained a new disclosure requirement on the company's internal pay ratio. The rationale for disclosing the ratio was the remit of the supervisory board to take into account the employment conditions and remuneration of other employees when developing remuneration proposals for management board members.[167] The ratio would have been the fraction of the average remuneration of management board members (executive directors) divided by the average remuneration of all other full time employees.[168]

This provision was highly criticised and was removed from the proposal. The reasons for its removal included[169]:

(i) the practical difficulties and cost of the calculation as, for example, variable remuneration in itself is difficult to calculate, and deferred remuneration is not easily attributed to a certain year;

165 Provision 26.2 of the French CG Code.
166 Belgian House of Representatives, 2336/001, at 18 (22 December, 2009).
167 https://www.pwc.nl/nl/assets/documents/pwc-the-executive-pay-challenge.pdf, p.18-19.
168 https://www.pwc.nl/nl/assets/documents/pwc-the-executive-pay-challenge.pdf, p.18-19.
169 https://www.pwc.nl/nl/assets/documents/pwc-the-executive-pay-challenge.pdf, p.19 and European Issuers, shareholders' rights directive, remuneration, 20 May 2014; http://www.deloitte.co.uk/executiveremuneration/assets/pdf/eu-shareholder-rights-directive-july-2015.pdf

(ii) the uncertainty of the interpretation of 'pay ratio' insert that will depend on many factors, including company history, company size, field of activity, strategy, organisation of production, subcontracting and outsourcing policy and distribution of categories of employees, making pay ratios incomparable; and

(iii) the inconsistency of the pay ratio with the main aim of the directive, ie enhancing long-term shareholder engagement, since the ratio risks have the distorting effect of aligning pay ratios, thus forcing companies into an undesirable 'one size fits all' solution.

In the Shareholders' Rights Directive, the following provisions were included:

(A) Requirement for the remuneration policy to explain how the pay and employment conditions of employees of the company have been taken into account when establishing the remuneration policy; and

(B) Requirement for the remuneration report to contain, for each individual director's remuneration, the average remuneration on a full-time equivalent basis of employees of the company other than the directors over at least the five most recent financial years, presented together in a manner which permits comparison.

Nevertheless, certain EU member states already strive to meet the public concern, not by limiting/fixing the pay ratio or wage gap but by taking it into account when making decisions on remuneration.

According to the Dutch CG Code, the remuneration policy applicable to management board members should take into account the internal pay ratios within the enterprise.[170] It is further specified that the remuneration committee should submit a proposal to the supervisory board concerning the remuneration of individual members of the management board and that such proposal is to be drawn up in accordance with the remuneration policy that has been established and will, in any event, also cover the pay ratios within the company and its affiliated enterprise.[171] Best practice provision 3.1.4, section iv further stipulates that information on the pay ratios within the company and its affiliated enterprise should form part of the remuneration report. The ratio between the remuneration of the management board members and that of a representative reference group determined by the company must be stated, along with whether there have been any changes in these ratios compared to the previous financial year.

Under the French CG Code, the compensation of executive officers, the boards and the committees must take into account and rigorously apply the principles of "comparability" (according to which the compensation must be assessed within the context of a business sector and the reference market) and "proportionality" (according to which the determination of the compensation components must be well-balanced and simultaneously take account of the company's general interest, market practices, the performance of the directors, and the other stakeholders in the company).[172]

In Germany, both the compensation structure in place in other areas of the company as well as the relationship between the compensation of the management board and that of senior management and the staff overall are criteria for determining the "appropriateness" of compensation.[173]

In the United Kingdom, the supporting principle to principle D.1 of the UK CG Code states that the decision on remuneration should be made sensitive to pay and employment conditions elsewhere in the group, especially when determining annual salary increases. This is also reflected in the statutory reporting regulations which provide that the directors' remuneration policy must contain a statement on how pay and employment conditions of employees were taken into account when setting the policy for directors' remuneration, including whether, and if so, how, the company consulted with its employees. In addition, companies are required to include details of the relative importance of spend on pay and to disclose the percentage change in the CEO remuneration and that of the employees of the company in the annual remuneration report.

(b) Cap on remuneration component

A new disclosure requirement of a maximum level for executive pay was also included in one of the first drafts[174] of the proposal for the Shareholders' Rights Directive. There would be no binding cap on remuneration at EU level, but each company would have to put its remuneration policy, including the maximum level for executive pay, to a fully binding shareholder vote.

170 Principle 3.1 of the Dutch CG Code.
171 Provision 3.2.1 of the Dutch CG Code.
172 Provision 24.1.2 of the French CG Code.
173 Provision 4.2.2 of the German CG Code.
174 European Commission, press release 9 April 2014, http://europa.eu/rapid/press-release_IP-14-396_en.htm; http://highpaycentre.org/blog/shareholder-rights-directive-may-the-ivth-be-with-you

The requirement of a disclosed defined maximum on executive pay was quite controversial and was quickly abandoned. Not only would the publication of the planned envisaged maximum amount of executive remuneration seriously interfere with negotiations when hiring new executive directors and senior management, it would also lead to a statutory obligation to disclosure of the negotiating framework of one of the parties, which would be to the detriment of the company's interests. Moreover, if the aim of the Shareholders' Rights Directive in the field of remuneration is to achieve a better link between pay and performance of (executive) directors, then fixing and publishing a maximum amount of total remuneration would imply that, over a certain performance level, the relevant director is no longer rewarded. This effect was considered contrary to the purported objective of the Shareholders' Rights Directive.[175] Therefore, it is not surprising that the Shareholders' Rights Directive does not regulate the level of remuneration and leaves this decision to companies and their shareholders.

Of the jurisdictions studied, we have observed that a cap on remuneration is only introduced in the German CG Code where, according to principle 4.2.3, "*the amount of compensation of the management board shall be capped, both overall and for individual compensation components*". In the other jurisdictions studied, we have only found general proportionality principles advocating the limitation of excessive remuneration.

In the Belgian 2009 Code, the only hint relating to proportionality is found in principle 7.1 where the word "sufficient" can be read as "nothing more than is needed". Belgian corporate governance rules do not entirely reflect the 2009 Remuneration Recommendation that the remuneration committee should ensure that the remuneration of individual executive or managing directors is proportionate to the remuneration of other executive or managing directors and other staff members of the company.

(c) Cap on severance pay

The only part of remuneration where a cap seems to be generally accepted throughout EU member state practice[176], is severance pay on the termination of an employment or consultancy contract, as is the case in Belgium. Principle 7.18 of the Belgian 2009 Code had already provided for a cap on severance pay of 12 months' fixed and variable remuneration, when the law of 6 April 2010 introduced article 554, paragraphs 4 and 5 of the Company Law, under which severance payments of more than 12 months' total remuneration remain possible but must be approved *ex ante* by shareholders at the general meeting of shareholders or, when exceeding 18 months' total remuneration, also by the remuneration committee.

7.7 Simplification

A final emerging trend within the discussions over remuneration is simplification, which we have observed at several levels. First of all, the (concrete) step towards standardisation (see section 7.4 above) can be categorised under this trend, as shareholders need a clear overview in order to simplify the readability and comprehension of all corporate governance declarations and statements. Secondly, we can observe increasing simplification of the content of the code itself. Sweden,[177] for example, simplified the section on remuneration in its corporate governance code by making the rules on certain variable remuneration clearer for shareholders. Finally, the simplification trend is also noticeable in the form(at) of the corporate governance codes where, for example, Germany[178] has in recent years deleted a total of six recommendations with the aim of streamlining parts of its code and improving its readability; similarly, a number of pages in the Dutch CG Code were also significantly reduced on the occasion of the last revision. In general, the simplification trend is the least tangible trend.

In the field of directors' remuneration, the combination of public pressure and growing European regulation on the topic has resulted in enhanced and more detailed soft law as well as a shift from soft law to hard law. In Belgium, the law of 6 April 2010 on the reinforcement of listed companies (whose provisions were inspired by the Remuneration Recommendations and the Belgian 2009 Code) enabled the migration into hard law and it turned Belgium into a frontrunner in the area of regulation of directors' remuneration, by providing legal enforceability for the majority of its remuneration provisions. This migration has also lead to a number of overlaps (and discrepancies) between the Company Law and the Belgian 2009 Code that will need to be addressed at the occasion of the future revision of the Belgian 2009

175 European Issuers, shareholders' rights directive, remuneration, 20 May 2014.
176 See Report COM (2010) 285: a majority recommends or requires limitation of termination payments, see AT, BE, DE, DK, EE, FR, IE, IT, LT, LU, NL, PT, SE, SI and the UK. However, AT, BE, DE and FR limit termination payments to a maximum amount of total annual remuneration, instead of fixed remuneration as recommended.
177 Swedish Corporate Governance Board, press release 1 October 2015.
178 Deutscher Corporate Governance Kodex, press release 11 May 2015.

Code.

The emerging trends of standardisation and simplification in the field of remuneration should be given a warm welcome: giving a place to these trends will undoubtedly facilitate effective shareholder engagement as shareholders will benefit from a better overview and improved comparability.

8. Principle 8: The company shall enter into a dialogue with shareholders and potential shareholders based on a mutual understanding of objectives and concerns

CURRENT TEXT OF THE BELGIAN 2009 CODE
8.1 The company should treat all shareholders equally and respect their rights.   *Communication with shareholders and potential shareholders*   *8.2 The company should design a disclosure and communication policy promoting an effective dialogue with shareholders and potential shareholders.*   *8.3 The company should ensure that all necessary facilities and information to enable shareholders to exercise their rights are available. The company should dedicate a specific section of its website to describing the shareholders' rights to participate and vote at the general shareholders' meeting. This section should also contain a timetable on periodic information and shareholders' meetings. The articles of association and the CG Charter should be available at any time.*   *8.4 The company should disclose the identity of its major shareholders in its CG Charter, together 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. The company should also disclose other direct and indirect relationships between the company and major shareholders.*   *General shareholders' meeting*   *8.5 The company should encourage the shareholders to participate in the general shareholders' meeting. The general shareholders' meeting should be used to communicate with shareholders. Those shareholders who are not present should be able to vote in absentia, such as by proxy voting.*   *Guideline The company could, in this respect, also take into account how non-resident shareholders can exercise their rights. Given the existing framework, the company should consider whether communication technology could offer solutions to some practical issues and whether an appropriate approach could be developed in this respect.*   *Guideline The company should discuss with financial intermediaries how to increase participation at the general shareholders' meeting.*   *Guideline The company should ask institutional shareholders and their voting agencies for explanations on their voting behaviour.*   *8.6 The company should make the relevant information accessible through its website in advance of general shareholders' meeting.*   *8.7 On convening meetings, the company should provide appropriate explanations on agenda items and on resolutions put forward by the board. In addition to the formalities imposed by the Code on Companies in this respect, the company should use its website to make public all relevant information and documentation on the exercise of the shareholders' voting rights.*   *8.8 The level of shareholding for the submission of proposals by a shareholder to the general shareholders' meeting should not exceed 5% of the share capital.*   *8.9 The chairman conducts the general shareholders' meeting and should take the necessary measures to ensure that any relevant questions from shareholders are answered. At the general shareholders' meeting, the directors should answer questions put to them by the shareholders on their annual report or on the items on the agenda.*   *Guideline Under the guidance of the chairman of the board, directors should answer such questions, insofar as the answers would not materially prejudice the company, its shareholders or its employees.*   *8.10 The company should post the results of votes and the minutes of the general shareholders' meeting on its website as soon as possible after the meeting.*   *Companies with one or more controlling shareholder(s)*   *8.11 For companies with one or more controlling shareholder(s), the board should endeavour to have the controlling shareholder(s) make a considered use of its/their position and respect the rights and interests of minority shareholders. The board should encourage the controlling shareholder(s) to respect this Code.*

Shareholders

8.12 Given the reliance on market monitoring to enforce the flexible 'comply or explain' approach of this Code, the board should take the necessary measures to encourage shareholders, and in particular institutional shareholders, to play an important role in carefully evaluating a company's corporate governance. The board should endeavour to ensure that institutional and other shareholders weigh up all relevant factors drawn to their attention.

8.13 The board should endeavour to ensure that shareholders carefully consider the explanations given for deviating from this Code and encourage them to make reasoned judgements in each case. The board should engage in a dialogue with shareholders if those shareholders do not accept the company's position, bearing in mind in particular the company's size and complexity and the nature of the risks and challenges it faces.

8.1 Topics for change – general introduction

One of the assumptions underlying the G20/OECD Principles of Corporate Governance is that shareholders can best look after their own interests, that is, if they have sufficient rights and access to information.[179]

The regulatory framework in Belgium providing shareholders with rights and access to information is mostly included in hard law, pursuant to a migration from soft law in 2010 following the adoption of Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, thus ensuring that the essential legal infrastructure is available and that it operates efficiently. This framework has recently been strengthened by the Shareholders' Rights Directive.

'If long-term relationships are to be developed, it is important that companies should communicate their strategies to their major shareholders and that their shareholders should understand them. It is equally important that shareholders should play their part in the communication process by informing companies if there are aspects of the business which give them cause for concern. Both shareholders and directors have to contribute to the building of a sound working relationship between them.'
Cadbury 1992

However, corporate governance is not only about providing shareholders with rights and access to information; it is also about shareholders making effective and informed use of such rights and assuming their responsibilities. Shareholders, and in particular, institutional investors and asset managers, with their different perspectives, are expected to play a pivotal role in providing checks and balances (see also part 2, section 1.1).

The increased presence of (large) institutional investors in the last decade "*created the expectation that a new breed of highly skilled and well-resourced professional shareholders would make informed and effective use of shareholders' rights and would as such promote good corporate governance in companies in which they invest*".[180] However, this expectation has not (always) been met. The EC has observed that there is evidence that the majority of shareholders are passive and often only focused on short-term profits.[181] In addition, the EC recently identified insufficient shareholder engagement as one of the main issues in the field of corporate governance.[182]

An indicator for the level of shareholder engagement is the turnout of shareholders at general meetings. A low turnout of shareholders generally indicates a suboptimal level of shareholder engagement, whereas a high level of turnout generally indicates a higher level of shareholder engagement.[183] However, because evidence of voting is not *per se* proof of responsible ownership or meaningful engagement, it is also important to look beyond the numbers, and the OECD takes the view that:[184]

– the increase in institutional shareholders in the last decade[185] has had a positive effect on direct contact and dialogue between the board and the shareholders of a company, however, this form of direct engagement contributes to the establishment of proposals presented at shareholder meetings and turns voting results into a rather limited sample for examining the degree of investor activity;
– in cases where votes are cast automatically or mandatorily in response to a 'real or perceived' regulatory requirement to vote and there is no real communication between shareholders and companies (so-called blind voting), there is a negative impact on the quality of engagement; and

179 OECD (2011), *The Role of Institutional Investors in Promoting Good Corporate Governance, Corporate Governance*, OECD Publishing, p. 9.
180 OECD (2011), *The Role of Institutional Investors in Promoting Good Corporate Governance, Corporate Governance*, OECD Publishing, p. 9.
181 2011 Green Paper, p. 3.
182 Impact Assessment, p. 4.
183 Impact Assessment, p. 18.
184 Eurosif, *Shareholder Stewardship: European ESG Engagement Practices 2013*, p. 32.
185 G20/OECD Principles of Corporate Governance, p. 29-30.

– a high level of cross-border shareholding may also be a factor leading to low turnouts or low levels of dissent in shareholder meetings.[186]

Turnout at annual general shareholders' meetings in Europe averages at around 61%, which is relatively low.[187] This low turnout can be explained by a number of factors, such as a high level of foreign share ownership in European companies, no harmonised set of rules at EU-level for shareholder participation in general meetings, etc. Also, where minority shareholders do vote, they often rely on proxy advisors, especially in the case of cross-border holdings.

In addition to low turnouts, a low level of votes cast against the recommendations of company management may also be an indicator of suboptimal shareholder engagement. However, as is the case for the level of turnout, this number is also relative because the actual voting decision of a shareholder may be the result of a prior engagement process between the company, on the one hand, and the shareholder on the other hand (eg where a shareholder does not *per se* agree with the proposal but nevertheless votes in favour of it because sufficient commitment has been obtained from management that it will change its approach in the long term).[188]

The sometimes limited powers granted to shareholders by national law, the cost of engagement, the difficulty of valuing the engagement and the uncertainty of the outcome of the engagement etc are often presented as reasons for the 'absent owner' phenomenon, particularly in companies with a dispersed ownership, but also, as far as minority shareholders are concerned, in controlled companies.[189]

'The effectiveness and credibility of the entire corporate governance system and company oversight will to a large extent depend on institutional investors that can make informed use of their shareholder rights and effectively exercise their ownership functions in companies in which they invest.'
Annotations to the G20/OECD Principles of Corporate Governance

Thus, it is understandable that code developers want to find a way to encourage shareholder engagement. There are different options available to code developers to alleviate the 'absent owner' phenomenon, including, but not limited to:

– addressing shareholders in the codes (see section 8.2);
– granting additional powers to shareholders (see section 8.3); and
– (the facilitation of) shareholder identification (see section 8.4).

In order to improve the quality of shareholder engagement, it is of added importance that a European initiative is set up in view of regulating proxy advisors (see section 8.5). The Shareholders' Rights Directive as recently adopted addresses each of the aforementioned options.

8.2 Addressing shareholders in the codes

In general, the codes, with the UK Stewardship Code as a noteworthy exception, contain many duties for the directors to inform and engage with shareholders, but few duties for the shareholders themselves. This may partially be explained by the fact that the codes are addressed at listed companies and their boards (and not at their shareholders) and that it is hard to fit obligations for shareholders within the 'comply or explain' structure. However, we note in the Shareholders' Rights Directive that certain obligations are imposed on institutional investors and asset managers; including, but not limited to:

– the requirement for institutional investors and asset managers either to develop and publicly disclose a policy on shareholder engagement (including a description of how they integrate shareholder engagement in their strategy; which different engagement activities they choose to carry out and how they do so, how they manage potential and actual conflict of interests in relation to their engagement, etc) or to explain why they have chosen not to do so;
– the requirement for institutional investors and asset managers to publicly disclose information on the implementation of their engagement policy and, in particular, on how they have exercised their voting rights;
– the requirement for institutional investors to disclose information annually to the public explaining how the main elements of their equity investment strategies are consistent with the profile and duration of their liabilities and how these elements contribute to the medium to long-term performance of their assets;
– where institutional investors make use of asset managers, institutional investors should disclose to the public certain key elements of the arrangements with the asset manager; and

186 OECD (2011), *The Role of Institutional Investors in Promoting Good Corporate Governance, Corporate Governance*, OECD Publishing, p. 57.
187 Hewitt, P. (2011), *The exercise of Shareholder Rights: Country Comparison of Turnout and Dissent, OECD Corporate Governance Working Papers*, No. 3, OECD Publishing, p. 15.
188 Hewitt, P. (2011), *The exercise of Shareholder Rights: Country Comparison of Turnout and Dissent, OECD Corporate Governance Working Papers*, No. 3, OECD Publishing, p. 18.
189 Klaus J. Hopt (Max Planck Institute and European Corporate Governance Institute (ECGI)), *Comparative Corporate Governance: The State of the Art and International Regulation*, January 2011, p. 51; 2011 Green Paper, p. 11.

– the requirement for asset managers to give information to the institutional investors that is sufficient to allow the latter to assess whether and how the manager acts in the best long-term interests of the investor and whether the asset manager pursues a strategy that provides for efficient shareholder engagement.

France

The French CG Code does not contain any specific general shareholder duties. However, it does address majority shareholders (and groups of shareholders acting in concert) by stating that they assume a specific responsibility to the other shareholders, which is direct and separate from that of the board of directors. In accordance with the French CG Code, such shareholder(s) must take special care to prevent possible conflicts and to take all interests into account. However, the shareholders do not have a duty to report to the board of directors, and there are no specific requirements regarding this matter in the internal control procedure and corporate governance reports drawn up by the chairmen of French listed companies.

The French Middlenext Code aims to offer small- and medium-sized listed companies, which often have a controlling shareholder, guidelines for evaluating their governance. However, the Middlenext Code expressly states that it does not intend to make recommendations to shareholders, but that it nevertheless wishes (via "points de vigilance" and recommendations) to draw attention to several points to which the board of directors should pay particular attention with respect to shareholder engagement.

On 2 July 2015, the AMF issued a recommendation with regard to the permanent dialogue between shareholders and companies.

Germany

The German CG Code defines the role of the general meeting and describes its organisation. In addition, since its recent revision in 2017, the German CG Code declares the expectation that institutional investors shall make use of their shareholder rights actively and in a responsible way, based on transparent principles taking into account a sustainable development.

The Netherlands

In accordance with the preamble to the Dutch CG Code, shareholders can give priority to their own interests, as long as they act in keeping with the principles of reasonableness and fairness in relation to the company, its organs and their fellow shareholders. This includes the willingness to engage with the company and fellow shareholders. The greater the interest the shareholder has in a company, the greater their responsibility to the company, fellow shareholders and other stakeholders. Institutional investors are responsible to the ultimate beneficial owners for the careful and transparent assessment of how to exercise their rights as shareholders of companies.

In chapter 4 of the Dutch CG Code, it is expressly stated that good corporate governance requires the fully fledged participation of shareholders in decision-making in the general meeting. Provisions 4.3.5 and 4.3.6 of the Dutch CG Code further state that:

- *institutional investors (pension funds, insurers, investment institutions and asset managers) should post annually, and in any event on their website, their policy on the exercise of the voting rights for shares they hold in listed companies; and*
- *institutional investors should report annually, on their website and/or in their management report, on how they have implemented their policy on the exercise of the voting rights in the relevant financial year. In addition, they should report on their website at least once per quarter on whether and, if so, how they have voted as shareholders at general meetings. This report is to be posted on the website of the institutional investor.*

Under Section 5.86 of the Financial Supervision Act, Dutch institutional investors are obliged to include a statement on their compliance with the best practice provisions of the Dutch CG Code in their annual report or on their websites. The investor that has not applied a best practice provision must explain carefully why ('comply or explain').

On the occasion of the 2016 revision of the Dutch CG Code, the Dutch CG Committee considered it too early to introduce substantive changes to the current Dutch CG Code on a company's relationship with its shareholders. It preferred to await the crystallisation of on going discussions and developments. The Dutch CG Committee did indicate that it was advisable to explore the possibility of including shareholder responsibilities in a stewardship code on the occasion of a future revision of the Dutch CG Code.

United Kingdom

The UK CG Code states that companies and shareholders both have a responsibility for ensuring that the 'comply or explain' approach remains an effective alternative to a rules-based system. The UK CG Code contains a section E entitled 'Relations with shareholders', in which it is stated that there should be a dialogue with shareholders based on the mutual understanding of objectives. It is the board as a whole that has responsibility for ensuring a satisfactory dialogue with shareholders. In accordance with supporting this main principle, the chairman should, while recognising that most shareholder contact is with the chief executive and finance director, ensure that all directors are made aware of their major shareholders' issues and concerns and the board should keep in touch with shareholders opinions in whatever ways are most practical and efficient.

It is the responsibility of the chairman to ensure that the views of shareholders are communicated to the board as a whole. The chairman should discuss governance and strategy with major shareholders. Non-executive directors should be offered the opportunity to attend scheduled meetings with major shareholders and should expect to attend meetings if requested by major shareholders. The senior independent director should attend sufficient meetings with a range of major shareholders to listen to their views in order to help develop a balanced understanding of the issues and concerns of major shareholders.[190]

The board should state in the annual report the steps they have taken to ensure that the members of the board, and in particular, the non-executive directors, develop an understanding of the views of major shareholders about the company, for example through direct face-to-face contact, analysts' or brokers' briefings and surveys of shareholder opinion.[191]

When, in the opinion of the board, a significant proportion of votes have been cast against a resolution at any general meeting, the company should explain when announcing the results of voting what actions it intends to take to understand the reasons behind the vote result.[192]

The UK Stewardship Code addresses institutional investors directly. It aims to provide guidance for good practice on monitoring and engaging with investee companies and reporting to clients and their beneficiaries. The code is composed of principles and guidance provisions, both of which are subject to the 'comply or explain' principle. According to the code, institutional investors should, in view of protecting and enhancing the value that accrues to the ultimate beneficiary:

- *publicly disclose their policy on how they will discharge their stewardship responsibilities;*
- *have a robust policy on managing conflict of interests in relation to stewardship which should be publicly disclosed;*
- *monitor their investee companies;*
- *establish clear guidelines on when and how they will escalate their stewardship activities;*
- *be willing to act collectively with other investors where appropriate;*
- *have a clear policy on voting and disclosure of voting activity; and*
- *report periodically on their stewardship and voting activities.*

However, institutional investors are free to choose whether or not to engage.

The FRC recently contacted signatories to the UK Stewardship Code on an individual basis to indicate where their statements need to improve and subsequently moved to tier signatories publicly.[193] *This form of individual monitoring, followed by "name and shame" has, up to now, been instrumental in the context of corporate governance compliance.*

Other initiatives

In addition to the provisions addressed at shareholders and included in the codes of the jurisdictions studied, we have identified a number of other (voluntary) initiatives.

By way of example, on 6 April 2011 the European Fund and Asset Management Association issued the EFAMA Code for External Governance[194] *and in the Netherlands, Eumedion (a voluntary foundation representing institutional investors' interests, among others, in the field of corporate governance) adopted best practices for engaged share ownership on 30 June 2011.*[195]

The eighth principle of the Belgian 2009 Code highlights the importance of a dialogue with (potential) shareholders. The board of directors of a company is to take the necessary measures to encourage shareholders, in particular institutional shareholders, to play a significant role in carefully evaluating the company's corporate governance and to consider carefully the explanations given for deviating from the code. In addition, the board is to endeavour to ensure that the controlling shareholders make considered use of their position and respect the rights and interests of minority shareholders. The recommendation is addressed at the board (not at the shareholders themselves) and the 'comply or explain' principle applies to these recommendations.

In its preamble, the Belgian 2009 Code addresses the shareholders in a more direct way, stating that "*they should be prepared to enter into a dialogue if they do not accept the company's position, bearing in mind in particular, the size and complexity of the company and the nature of the risks and challenges it faces*". It furthermore states that controlling shareholders should make considered use of their position and respect the rights and interests of minority shareholders.

Addressing shareholders to engage in the corporate governance of the companies they invest in is increasingly considered a matter of importance, but this goal does not necessarily need to be achieved via the same channels as those for boards of

190 Provision E.1.1 of the UK CG Code.
191 Provision E.1.2 of the UK CG Code.
192 Provision E.2.2 of the UK CG Code.
193 https://www.frc.org.uk/Our-Work/Corporate-Governance-Reporting/Corporate-governance/UK-Stewardship-Code.aspx
194 http://www.beama.be/nl/publicaties/aanbevelingen/110509_EFAMA%20Code%20for%20External%20Governance%20-2.pdf
195 http://www.eumedion.nl/en/public/knowledgenetwork/best-practices/best_practices-engaged-share-ownership.pdf

directors. We note that even if a corporate governance code contains direct obligations for shareholders, the 'comply or explain' principle will still not apply in most cases (except, for example in the Netherlands, where the 'comply or explain' principle does apply to institutional investors but only with respect to certain specific provisions) and is in any event difficult to implement.

Separate guidance notes or separate codes (such as the UK Stewardship Code), which are addressed specifically at shareholders, may provide effective guidance to shareholders and specifically to institutional investors that often face the difficult situation of having to deal with a large portfolio of companies, spread around the world, together with the diverse corporate governance traditions that relate to these different codes.

The (implementation of the) Shareholders' Rights Directive, will trickle down the coming years into hard law across Europe and therefore promises to be more effective than including obligations for institutional investors in corporate governance codes or a collection of national stewardship codes.

The corporate governance code may not be the right place to address shareholders. It is indeed important to make the distinction between (i) corporate governance rules primarily addressed at companies and their boards and committees; and (ii) shareholder governance rules addressed at (institutional) shareholders.

8.3 *Granting of additional powers to shareholders*

The sometimes limited powers granted to the shareholders by national law are often presented as reasons for the 'absent owner' phenomenon. The granting of (additional) rights to shareholders on certain topics is expected to have a positive impact on shareholder engagement. By way of example, we have identified a number of topics where certain other jurisdictions go beyond that which is currently prescribed in the Belgian 2009 Code with respect to shareholders' rights.

(a) Related party transactions

Each of the jurisdictions studied has sought to address related party transactions, ie transactions between a company and its management, directors, controlling entities or shareholders. The regulation of related party transactions is of importance to shareholders, given that related party transactions create the opportunity to obtain value belonging to the company to the detriment of its shareholders and in particular, minority shareholders.[196]

In general, the approach taken is not to prohibit related party transactions, but to regulate them. The jurisdictions studied have done this through a combination of measures, including, but not limited to mandatory disclosure, board approval and, in some cases, shareholder approval and the prohibition of certain related party transactions.[197]

Shareholder approval of related party transactions can be regarded as an alternative or complement to the board approval procedure, but often applies only to large transactions or those not on market terms.
OECD Corporate Governance Factbook, 2015, p. 52

Source: OECD, Corporate Governance Factbook 2015, p. 50

196 OECD (2012), *Related Party Transactions and Minority Shareholder Rights*, OECD Publishing.
197 OECD, *Corporate Governance Factbook 2015*, p. 50.

The tools to mitigate the potential negative impact of related party transactions provided for in the jurisdictions studied seem to be included mostly in hard law. In Belgium, the relevant provisions are included in articles 523 and 524 of the Company Law:

Article 523 of the Company Law (and its mirror article 524ter) prescribes that directors (and executive committee members) must disclose their own conflicts of a financial nature (including related party transactions) to the board, to the auditors and to shareholders (with the exception being recurrent transactions on normal market terms). They may not take part in the deliberations or vote on conflicted transactions and minutes must be made of the board's decisions in this respect, reported to the external auditor and disclosed in the annual report. This also applies to executives who are members of the executive committee.

Article 524 of Company Law mandates an approval procedure involving the board, independent directors and auditors as well as disclosure to shareholders of decisions and transactions of their company granting advantages to other companies of the same group, in particular the majority shareholder. Neither the subsidiary, nor any of its subsidiaries need to be wholly owned so that shareholders other than those of the parent company might be involved. Non-listed Belgian subsidiaries need approval from the listed parent company to transact with an affiliate of that company.

No shareholder approval is required in Belgium in respect of related party transactions. In some of the jurisdictions studied, shareholder approval is required for certain types of related party transactions (eg related party transactions outside the ordinary course of business, related party transactions representing more than a significant percentage of the companies' assets, related party transactions not on market terms, related party transactions disapproved of by the audit or equivalent committee involving independent directors, etc). By way of example, in the United Kingdom *ex ante* shareholder approval is required from non-interested shareholders for non-routine related party transactions.

Shareholder approval of related party transactions for certain types of related party transactions can be regarded as complementary to the board approval procedure. The requirement of shareholder approval for certain types of related party transactions would provide institutional investors and asset managers (which are in most cases minority shareholders) with more control rights over related party transactions (which in turn would improve their ability to protect their investments).[198]

In this context, the question arises as to who is best placed to assess related party transactions: independent directors or shareholders? For related party transactions between a listed company and its majority shareholder, the Belgian legislator (in article 524 of the Company Law) has opted for a system of checks and balances exercised by a committee of independent directors and assisted by an independent expert rather than a shareholders' vote. The approach taken in article 524 of the Company Law has the advantage that certain business-sensitive information will remain confidential. The advice of the committee of independent directors is disclosed in the annual report ('transparency is the best disinfectant'), but not the detailed terms and conditions of the related party transaction. Also, the assessment of related party transactions for approval by the shareholders requires the active engagement of minority shareholders, acting in the company's best interest.

In its first draft of the Shareholders' Rights Directive, the EC proposed that:

- related parties representing more than 1% of the company's assets would be obliged to publicly announce such transactions immediately at the time of the conclusion of the transaction and annex a fairness opinion from an independent third party. Companies could request that their shareholders waive the fairness opinion requirement in advance, for a maximum period of 12 months, in the case of clearly defined types of recurrent transactions with an identified related party, provided that the shareholder affected by these transactions was excluded from the vote on the advance exemption.
- related party transactions representing more than 5% of the companies' assets or transactions which could have a significant impact on profits or turnover would have to be submitted for prior shareholder approval. Where the related party transaction involved a shareholder, this shareholder would have to be excluded from that vote. Companies would have been able to request advance approval from shareholders for clearly defined types of recurrent transactions with an identified related party for a maximum period of 12 months. Transactions with the same related party that had been concluded during the previous 12-month period would have to be aggregated for the purposes of the calculation of the 5% threshold.

This proposal proved quite controversial and the final text of the Shareholders' Rights Directive has been watered down, both with respect to the external fairness opinion and with respect to shareholder approval.

198 Impact Assessment, p. 5.

The text of the Shareholders' Rights Directive now states that:

– 'material' related party transactions must be publicly announced at the latest at the time of the conclusion of the transaction and EU member states may provide that the announcement must be accompanied by 'a report' assessing whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party (including minority shareholders) and explaining the assumptions it is based upon together with the methods used.
– the EU member states are left with the choice as to who drafts this report, either (i) an independent third party, (ii) the administrative or supervisory body of the company or (iii) the audit committee or any committee, the majority of which is composed of independent directors.

The EU member states will have to define material transactions, taking into account:

– the influence that the information about the transaction may have on the economic decisions of the shareholders of the company; and
– the risk that the transaction creates for the company and its shareholders who are not a related party, including minority shareholders.

When defining material transactions, EU member states must set one or more quantitative ratios based on the impact of the transaction on the financial position, revenues, assets, capitalisation (including equity) or turnover of the company or take into account the nature of the transaction and the position of the related party.

The material related party transactions must be approved either by the shareholders or by the administrative or supervisory body of the companies, in accordance with procedures which prevent a related party from taking advantage of its position and provide adequate protection for the interests of the company and of shareholders that are not related parties, including minority shareholders. EU member states may grant shareholders at the general meeting the right to vote on material transactions with related parties which have been approved by the administrative or supervisory board of the company.

The Shareholders' Rights Directive further states that where the related party transaction involves a director or a shareholder, the director or shareholder must not take part in the approval or the vote. However, EU member states may allow the shareholder who is a related party to take part in the vote, provided that national law ensures appropriate safeguards that apply before and during the voting process to protect the interests of the company and the shareholders who are not a related party, including minority shareholders, by preventing the related party from approving the transaction despite the opposing opinion of the majority of the shareholders who are not a related party or despite the opposing opinion of the majority of the independent directors.

(b) Asset deals

Under Belgian law, the approval of the shareholders' meeting (deciding with a qualified majority) is required for most of the transactions impacting on the structure or the value of the company (eg in case of a (partial) demerger, a merger, a (partial) split, etc). However, this is not the case for asset deals.

The decision to sell (all or part of) the assets of the company lies solely with the board of directors. This is remarkable, given that the sale of (all or part of) the assets of a company can strip the company of the growth potential inherent to the assets of the company.

Of the jurisdictions studied, we have observed in France, in accordance with provision 5.3 of the French CG code, that an advisory vote of the shareholders is required if a disposal is contemplated, in one or more transactions concerning at least half of the company's assets in the two financial years preceding the contemplated disposal.[199] This recommendation replicates the French Market Authority recommendation (position-recommendation DOC-2015-05) issued following notably the sale and contribution of the Vivendi holding in SFR to Altice which has generated a strong need of transparency and clarity on the decision-making process of the board, in a context of auctions between Altice and

[199] If a disposal is contemplated in one or more transactions concerning at least half of the company's assets in the past two financial years preceding the contemplated disposal, the board of directors and the executive management must assess the strategic merits of the transaction and ensure that the process takes place in accordance with the corporate interest, in particular by putting in place the resources and procedures enabling any conflict of interests to be identified and managed. In this respect, they may seek external opinions, particularly concerning the merits of the transaction, its valuation and the contemplated arrangements. It is also recommended that the board of directors sets up an ad hoc committee, at least two-thirds of which is made up of independent directors, without the involvement of executive directors. Prior to carrying out this disposal, the board of directors must present the shareholders' meeting with a report about the context and the progress of the transactions. This presentation must be followed by an advisory vote by the shareholders according to the same quorum and majority conditions as for ordinary shareholders' meetings. If the meeting issues a negative opinion, the board of directors must meet as soon as possible and immediately publish on the company's website a notice detailing how it intends to proceed with the transaction.

Bouygues[200]. In the United Kingdom, for a commercial company with a premium listing of equity shares, shareholder approval is required for Class 1 transactions (the Listing Rules classify a transaction according to its size by reference to a number of different percentage ratios).[201]

The shareholder approval requirement (whether advisory or binding) for asset deals of a certain size would provide shareholders with more certainty as to the value of their investment and more control. However, an obligation to submit (the terms of) the deal to a (time-consuming) shareholders' vote, the outcome of which is uncertain, may add, especially in listed companies, another layer of uncertainty.

(c) Remuneration policy – "say on pay"

With respect to remuneration, there has been a significant build-up of power over the last decade for shareholders of Belgian listed companies. The Company Law gives the shareholders a say over certain forms of variable remuneration (article 520ter and 554 of the Company Law) and severance pay (article 554 of the Company Law). Today, Belgium is a frontrunner in this respect. However, still very much at the centre of public debate, this is a topic that is subject to rapid evolution and therefore should be monitored very closely by code developers (see part 2, section 7 on principle 7 of the Belgian 2009 Code).

8.4 Disclosure of the identity of major shareholders

The EC is of the opinion that identification of the shareholder is essential to facilitate the exercise of shareholder rights; it is a prerequisite for direct communication between the shareholder and the company. It is expected that the cooperation between the company and the shareholder will improve[202] and corporate governance will be strengthened when a company can communicate directly with its shareholders.[203] As such, shareholder engagement will also be positively impacted.[204] Shareholder identification will not only benefit shareholder engagement, it will also allow for the more effective monitoring of shareholder engagement policies.

As most of the issues in the area of shareholder identification are of a cross-border nature (eg the uncertainty regarding the possibility of disclosing the identity of the shareholder), and given that the EC has observed that only limited progress can be made through voluntary market standards (eg the Market Standards on Corporate Actions Processing and Market Standards on General Meetings),[205] EU action is necessary in the field of shareholder identification. The necessary balance will have to be found between the facilitation of the exercise of shareholders' rights on the one hand, and the right to privacy and the protection of personal data of investors, on the other.

In line with the above, the Shareholders' Rights Directive requires that intermediaries provide the company with information on shareholder identity (meaning information allowing the identity of a shareholder to be established) on the request of the company. However, EU member states will be allowed to exclude those shareholders who hold only a small number of shares from this requirement.

Considering the cross-border and data protection aspects of shareholder identification, this seems to be a matter which may require a hard law approach.

8.5 Regulatory proxy advisors

Proxy advisors provide recommendations to investors (often with highly globalised and diversified portfolios) on how to vote in general shareholders' meetings. As such, they may significantly facilitate the investors' decision-making, while exercising strong influence on the market. It would require the investor conducting its own research to conclude differently, and would have to "*justify and render account both to themselves and to their beneficiaries why they are going*

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200 http://www.amf-france.org/en_US/Reglementation/Dossiers-thematiques/Societes-cotees-et-operations-financieres/Gouvernement-d-entreprise/position-recommandation-cession-acquisition-actifs-significatifs.html?langSwitch=true
201 FCA Handbook, Listing Rules, Chapter 10.
202 Capita Registers, *Response to the Green Paper on the EU Corporate Governance Framework*, p. 8, notes that where there is greater visibility of the shareholder basis, there tends to be a higher level of voting.
203 Impact Assessment, p. 34.
204 Impact Assessment, p. 43.
205 The Market Standards for Corporate Actions Processing were endorsed in 2009 and are being implemented. They cover the most common and complex corporate actions on stocks (eg dividend payments, early redemptions, stock splits) and on flows (eg transformations). The Market Standards for General Meetings were endorsed in 2010 and are currently being assessed against market practices and the legal and regulatory requirements that exist.

against the advice of the expert called in by them".[206] The impact of proxy advisors is even more reinforced by the fact that they experience only limited competition.[207]

The OECD observed that, in the last decade, a number of concerns in relation to proxy advisors have been expressed:

- the risk of a 'one size fits all' approach (ie where the methodologies used by proxy advisors to make their recommendations do not sufficiently take into account local market and regulatory conditions) that would negatively affect the quality and the accuracy of the advice to investors; and
- conflicts of interest.[208]

Notwithstanding these concerns relating to proxy advisors, they were until recently not subject to any regulation at EU level. Non-binding rules do exist but only in a few member states. By way of example, the AMF issued on 18 March 2011 a recommendation addressed to proxy advisors covering subjects such as the prevention of conflicts of interest, communication with companies, the establishment and the issuance of a voting policy and the establishment and submitting of voting recommendations to investors. In the UK, the Stewardship Code also applies to proxy advisors. In addition to national initiatives, a number of industry members formed the Best Practice Principles Group to develop a set of Best Practice Principles for Providers of Shareholder Voting Research & Analysis, which should be adopted by signatories on a 'comply or explain' basis.

In the Shareholders' Rights Directive, it is recognised that many institutional investors and asset managers use the services of proxy advisors who provide research, advice and recommendation on how to vote in general meetings of listed companies and that, while proxy advisors play an important role in corporate governance by contributing to reducing the costs of the analysis related to company information, they may also have an important influence on the voting behaviour of investors.

In accordance with the Shareholders' Rights Directive, member states are to ensure that proxy advisors that are subject to a code of conduct report on their application of that code and that they disclose certain key information relating to the preparation of their research, advice and voting recommendations and any actual or potential conflicts of interests or business relationships that may influence the preparation of the research, advice and voting recommendations.

Proxy advisors that do not apply a code of conduct, have to provide a clear and reasoned explanation why this is the case. Where proxy advisors do apply a code of conduct but depart from any of its recommendations, they have to declare from which provisions they depart, provide explanations for doing so and indicate, where appropriate, any alternative measures adopted.

In addition to the above, proxy advisors will also have to identify and disclose without delay to their clients any actual or potential conflicts of interests or business relationships that may influence the preparation of their research, advice or voting recommendations and the actions they have undertaken to eliminate, mitigate or manage the actual or potential conflicts of interest.

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206 OECD (2011), *The Role of Institutional Investors in Promoting Good Corporate Governance, Corporate Governance*, OECD Publishing, p. 59.

207 According to the ESMA analysis, there are currently less than ten players active in the EU, two of which are international players from the US (ISS and Glass Lewis) and a number of local participants in Europe, mostly with a domestic focus, such as Manifest in the UK, Ivox in Germany and Proxinvest in France.

208 OECD, Corporate Governance and the Financial Crisis: Key Findings and Main Messages, June 2009, p. 11.

9. Principle 9 – The company shall ensure adequate disclosure of its corporate governance

CURRENT TEXT OF THE BELGIAN 2009 CODE
9.1 The company should establish a CG Charter describing all the main aspects of its corporate governance policy, including at least the elements listed in the provisions of Appendix F, 9.1./1.
9.2 The CG Charter should be updated as often as needed to reflect the company's corporate governance at any time. It should be made available on the company's website and should specify the date of the most recent update.
9.3 The company should establish a CG Statement in its annual report describing all relevant corporate governance events that have taken place during the year under review. This CG Statement should be included in a specific section of the annual report and should contain at least the information listed in Appendix F, 9.3./1-2.
9.4 The company should state both in its CG Statement and its CG Charter that it has adopted this Code as its reference code. If the company has not complied fully with one or more provisions of this Code, it should explain its reasons for not having done so in the CG Statement ('comply or explain').

9.1 Topics for change – introduction

In 2006, Directive 2006/46/EC introduced the requirement for certain EU member state companies to publish a corporate governance statement including, *inter alia*, information on which corporate governance code applicable to them, if any, on a 'comply or explain' basis. In accordance with the 'comply or explain' principle, companies that depart from (part of) the corporate governance code applicable to them are required to explain in their corporate governance statement (i) which parts of the code they departed from and (ii) the reasons for doing so.

The 'comply or explain' approach provides companies with flexibility, by allowing them to adapt their corporate governance to their size, shareholding structure or sectorial specificities, etc. At the same time, it promotes a culture of accountability, encouraging companies to reflect more on corporate governance arrangements.[209]

High-quality disclosure on a company's corporate governance arrangements has many benefits as it can:

- provide useful information to investors, which in turn facilitates their investment decisions;
- enhance investor confidence;
- bring reputational benefits for companies; and
- create more legitimacy in the eyes of stakeholders and society as a whole.[210]

Directive 2006/46/EC does not set any quality or minimum requirements concerning the content or quality of the 'explain'. Also, EU member states have taken different paths to enforce the reference to a code and its application: corporate governance codes and the 'comply or explain' principle have, in practice, been implemented in laws, securities regulations, listing rules and sometimes in the code itself.[211]

9.2 Improving corporate governance reporting

Already in 2009, several shortcomings were identified concerning the application of the 'comply or explain' principle (in a study undertaken by RiskMetrics Group in collaboration with BUSINESSEUROPE, ecoDa and their affiliated members, and Landwell & Associés and their network of European affiliates), such as:

- explanations of departures that only indicate a deviation without further explanation;
- explanations of a general nature in which the company mostly indicates disagreement with the code provision without identifying a company-specific situation;

209 Comply or Explain Recommendation, recital (7).
210 Comply or Explain Recommendation, recital (5).
211 'RiskMetrics Group, BUSINESSEUROPE, ecoDa and Landwell & Associés, *Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States*, September 2009, p. 79.

- explanations in which companies do not explain the reasons for deviating from the code, but where additional information was given such as an alternative procedure.[212]

As these explanations are used by investors to make their investment decisions and to assess the value of a company, these shortcomings are considered to limit the system's usefulness and viability.[213] In the absence of Directive 2006/46/EC setting any quality or minimum requirements concerning the content or quality of the 'explain', each of the jurisdictions studied has found its own way to require the relevant companies to conform to a certain level of quality.

France

The French CG Code includes a separate principle on the implementation by companies of the 'comply or explain' principle, requiring listed corporations referring to the French CG Code to report in detail in their annual reports on the implementation of the recommendations included in the French CG Code and, if applicable, provide an explanation of the reasons why they have deviated from any of them.

The explanation to be provided when a French CG Code recommendation has not been applied must:

- *be comprehensible, relevant and detailed;*
- *be substantiated and adapted to the company's particular situation;*
- *convincingly indicate why this specific aspect justifies an exemption;*
- *state the alternative measures that have been taken, if applicable; and*
- *describe the actions that allow the company to comply with the aims of the relevant provision of the French CG Code.*

If a company intends to implement a recommendation in the future from which it has provisionally deviated, it must state when this temporary situation will come to an end. Companies must indicate in a specific section or table those recommendations that they have not implemented and the respective explanations.

In order to ensure the effective implementation of the fundamental corporate governance rule (comply or explain), in October 2013, Afep and Medef formed a High Committee responsible for monitoring the implementation of the French CG Code.

Germany

Companies may deviate from the recommendations included in the Germany CG Code but are then obliged to disclose this annually and to justify those deviations. It is stated that this enables companies to reflect sector and enterprise-specific requirements.

Sweden

In the Swedish CG Code it is stated that companies are not obliged to comply at all times with every rule included therein, but that they are allowed the freedom to choose alternative solutions which they feel are better suited to their particular circumstances, as long as they openly report every deviation, describe the alternative solution they have chosen and explain their reasons for doing so. In this way, the Swedish CG Code specifies what is often, but not necessarily always, regarded as good corporate governance practice. It is further indicated that in many cases, explanations of non-compliance may show that the company has carefully considered its corporate governance processes and found the solutions it finds best in each case.

The Netherlands

The Dutch CG Code includes a separate chapter entitled "Compliance with the Code" under which the conditions for departure from the Dutch CG Code are included.

In accordance with this chapter, the management board and the supervisory board account for compliance with the Dutch CG Code in the shareholders' general meeting, and provide a substantive and transparent explanation for any departures from the principles and best practice provisions.

Importantly, the explanation of any departures should in any event include the following elements:

- *how the company has departed from the principle or the best practice provision;*
- *the reasons for the departure;*
- *if the departure is of a temporary nature and continues for more than one financial year, an indication of when the company intends to comply with the principle or the best practice provision again; and*

212 'RiskMetrics Group, BUSINESSEUROPE, ecoDa and Landwell & Associés, *Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States*, September 2009, p. 169.

213 2012 Action Plan, p. 6.

– *where applicable, a description of the alternative measure that was taken and either an explanation of how that measure attains the purpose of the principle or the best practice provision or a clarification of how the measure contributes to good corporate governance of the company.*

United Kingdom

In December 2011, the FRC launched a discussion in the United Kingdom between companies and investors on what constitutes an appropriate explanation and, consequently, guidelines on the 'comply or explain approach' were introduced into the UK CG Code.

In accordance with these guidelines, if a company wishes to depart from the UK CG Code, the reasons for such departure must be clearly and carefully explained to shareholders who may wish to discuss the position with the company and whose voting intentions may be influenced as a result. In providing such explanation, the company should aim to illustrate how its actual practices are consistent with the principle to which the particular provision relates, contribute to good governance and promote the delivery of business objectives. It should set out the background, provide a clear rationale for the action it is taking, and describe any mitigating actions taken to address any additional risk and maintain conformity with the relevant principle. Where deviation from a particular provision is intended to be limited in time, the explanation should indicate when the company expects to conform with the provision.

In Belgium, guidance as to how the 'comply or explain' principle should be implemented is mainly found in three different places:

- Article 96, §2 of the Company Law: this articles of the Company Law requires listed companies to include a corporate governance statement in their annual report which has to include, *inter alia*, which corporate governance code is applied and, to the extent the relevant company does not apply such code in its entirety, an indication of the parts of the corporate governance code from which it deviates and the substantiated reasons therefor.
- Belgian 2009 Code:
  - in the preamble of the Belgian 2009 Code, it is clearly stated that in specific cases companies may depart from some of the Belgian 2009 Code's provisions provided that they give a considered explanation of the reasons for doing so. These companies should determine what they consider to be best practice in their specific situation, and provide a sound reason ('explain') for deviating from this in their corporate governance statement. Smaller companies, for example, may consider that some provisions are disproportionate or less relevant. Also, holding and investment companies may have a different board structure, which may affect the relevance of certain provisions. It is further specified that companies that give a considered explanation for the reasons why they depart from the Belgian 2009 Code may still be considered as applying the Belgian 2009 Code; and
  - in accordance with provision 9.4 of the Belgian 2009 Code, the company must, if it has not complied fully with one or more provisions of the Belgian 2009 Code, explain its reasons for not having done so in the corporate governance statement.
- Guidelines of the CGC: in 2012, the CGC issued an explanatory note including certain rules of thumb that are inherent to a qualitative 'explain'.

On 9 April 2014, the EC issued the Comply or Explain Recommendation. The purpose of the Comply or Explain Recommendation was to provide guidance to companies and to assist them in improving the quality of their corporate governance reporting. Given the diversity of legal traditions and approaches across the EU member states, these recommendations offer a general framework, which can be further developed and adapted by each of the EU member states to their specific national context.[214]

When we compare the recommendations included in the Comply or Explain Recommendation with those in CGC 2012 guidelines, we notice that Belgian corporate governance rules do not reflect:

- the EU recommendation that, for each departure from an individual recommendation, companies should clearly describe how the decision to depart from the recommendation was made within the company; and
- the EU recommendation that, where applicable, for each departure from an individual recommendation, companies should describe the measure taken instead of compliance and explain how that measure achieved the underlying objective of the specific recommendation or of the code as a whole, or clarify how it contributes to good corporate governance of the company.

In May 2016, the CGC, in its updated version of the explanatory note that had included certain rules of thumb for a qualitative 'explain', decided that it did not consider it necessary to update the rules of thumb issued in 2012 but that it did

214 Comply or Explain Recommendation, recital (12).

wish to make Belgian listed companies aware of the difference between their rules of thumb and the recommendations included in the Comply or Explain Recommendation.

Each of the codes of the studied jurisdictions contains instructions as to what is required in accordance with the 'comply or explain' principle. Some of the codes of the jurisdictions studied are quite detailed (eg the United Kingdom and the Netherlands) and others rather general (eg Sweden and Germany).

The revision of the Belgian 2009 Code might provide a window of opportunity for the CGC to include a separate chapter or to integrate the rules of thumb that are inherent to a qualitative 'explain'.

Schedule 1 – Definitions and Interpretation

2005 Remuneration Recommendation	: has the meaning set out in Part 2, section 2.3;
2009 Remuneration Recommendation	: has the meaning set out in Part 1, section 1.1;
2011 Green Paper	: has the meaning set out in Part 1, section 1.1;
2012 Action Plan	: has the meaning set out in Part 1, section 1.1;
2014 H&S Study	: Heidrick & Struggles International, Inc., *Towards Dynamic Governance 2014. European Corporate Governance Report*, http://www.heidrick.com/~/media/Publications%20and%20Reports/European-Corporate-Governance-Report-2014-Towards-Dynamic-Governance.pdf;
2015 ecoDa Study	: has the meaning set out in Part 1, section 1.1;
2015 ecoDa/IFC Guide	: has the meaning set out in Part 2, section 2.2(b);
2015 Guide to EU Corporate Governance	: means http://www.ifc.org/wps/wcm/connect/c44d6d0047b7597bb7d9f7299ede9589/CG_Practices_in_EU_Guide.pdf?MOD=AJPERES
Belgian 2009 Code	: means the 2009 Belgian Code on Corporate Governance dated 12 March 2009, accessible at http://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/corporategovukcode2009.pdf;
CGC	: has the meaning set out in the introduction;
Company Law	: has the meaning set out in Part 1, section 1.2;
Comply or Explain Recommendation	: has the meaning set out in Part 1, section 1.1;
Diversity Directive	: has the meaning set out in Part 1, section 1.1;
Dutch CG Code	: has the meaning set out in Part 1, section 1.3;
Dutch CG Committee	: has the meaning set out in Part 1, section 1.3;
EC	: has the meaning set out in Part 1, section 1.1;
EWB/ISS Study	: has the meaning set out in Part 2, section 2.2(b);
FRC	: has the meaning set out in Part 1, section 3.2;
French CG Code	: has the meaning set out in Part 1, section 1.3;
Gender Balance Proposal	: has the meaning set out in Part 1, section 1.1;
German CG Code	: has the meaning set out in Part 1, section 1.3;
German CG Commission	: has the meaning set out in Part 1, section 1.3;
Guberna and VBO 2014 Report	: has the meaning set out in Part 2, section 4.2;
Impact Assessment	: has the meaning set out in Part 1, section 1.1;
OECD	: means the Organisation for Economic Co-operation and Development;

Remuneration Recommendations	:	has the meaning set out in Part 1, section 1.1;
Shareholders' Rights Directive	:	has the meaning set out in Part 1, section 1.1;
Swedish CG Code	:	has the meaning set out in Part 1, section 1.3;
UK CG Code	:	has the meaning set out in Part 1, section 1.3.

Key contacts

Dirk Meeus
Partner
Tel +32 2 780 24 32
dirk.meeus@allenovery.com

Sophie Rutten
Counsel
Tel +32 2 780 24 75
sophie.rutten@allenovery.com

Katti Van Oosterwijck
Associate
Tel +32 3 287 75 25
katti.vanoosterwijck@allenovery.com

International contacts

Charles Honée
Partner
Tel +31 20 674 1227
charles.honee@allenovery.com

Hans-Christoph Ihrig
Partner
Tel +49 69 2648 5682
hans-christoph.ihrig@allenovery.com

Alun Eynon-Evans
Partner
Tel +44 20 3088 4796
alun.eynon-evans@allenovery.com

Frédéric Moreau
Partner
Tel +31 1 40 06 53 06
frederic.moreau@allenovery.com

Allen & Overy (Belgium) LLP

Uitbreidingstraat 80, B-2600 Antwerp Belgium | Tel +32 (0)3 287 7222 | Fax +32 (0)3 287 7244

Tervurenlaan 268A avenue de, Tervueren, B-1150 Brussels Belgium | Tel +32 (0)2 780 2222 | Fax +32 (0)2 780 2244

www.allenovery.com

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