Corporate Governance
COMMITTEE

Corporate Governance Committee
Rue des Sols 8
B-1000 Brussels
T + 32 2 515 08 59
F + 32 2 515 09 85
www.corporategovernancecommittee.be

EXPLANATORY NOTE ON THE RELATIONSHIP AGREEMENT

EXPLANATORY NOTE ON THE RELATIONSHIP AGREEMENT

The new 2020 Belgian Code on Corporate Governance (2020 Code), which entered into force on 1 January 2020, contains a range of innovations for listed companies.

One such innovation, namely the option to enter into a relationship agreement, is introduced in provision 8.7 as a topic of debate for boards: "The board should debate whether it would be appropriate for the company to enter into a relationship agreement with the significant or controlling shareholder(s)."

The concept of relationship agreements originated in the UK and is relatively unfamiliar to Belgian companies. Although such agreements will remain optional, it will now be up to the boards of directors or the supervisory boards of Belgian listed companies to debate the appropriateness of concluding a relationship agreement with the significant or controlling shareholder(s).

To aid boards in this matter, the Corporate Governance Committee (thereafter, “the Committee”) wishes to clarify the concept of relationship agreement in a Belgian context. This explanatory note is intended to provide a concise overview of the concept, its objectives, when it is used and its key components.

TABLE OF CONTENTS

1. WHAT IS A RELATIONSHIP AGREEMENT AND WHEN IS IT USED?

A **relationship agreement** is an agreement between a company and its significant or controlling shareholder(s). One party cannot force the other to enter into a relationship agreement; cooperation is voluntary. Such agreements may contain firm commitments, statements of intent, or a combination of the two. They govern the relationship between the company and its significant or controlling shareholder(s), focusing on a number of governance and, where appropriate, information-sharing mechanisms.

A relationship agreement may define the specific role played by the significant or controlling shareholder vis-à-vis the company and ensure transparency, at least with regard to the board, around said shareholder's intentions.

The Committee sees relationship agreements as reference frameworks that recall, clarify and supplement, where appropriate, the rules already set out in other texts (governance charters, articles of association, laws).

Relationship agreements are not necessarily legally binding and may contain intentions that are provided solely as a guide. It is up to the company and its significant or controlling shareholder(s) to decide whether they wish to go further and the extent to which they want to take on legally binding obligations. It may be useful to specify which provisions are binding and which are not.

2. HOW CAN THE RELATIONSHIP AGREEMENT BE UNDERSTOOD IN A BELGIAN CONTEXT?

The 'Belgian' model of governance is based on a relatively concentrated shareholder base and **the predominance of significant or controlling shareholders**, who can have considerable impact on a company.

Significant or controlling shareholders enjoy certain rights under the Code on Companies and Associations (CCA), depending on the size of their stake, and can influence how the company conducts its business. Owing to the capital invested, they also have greater interest in the company's performance. They have an incentive to **keep a close eye on the company's activities** and **encourage sustainability**. As such, significant or controlling shareholders are the guarantors of a commitment to the long-term development of the company from both a financial and non-financial perspective. In this sense, the controlling shareholder model can be an asset.

Some investors, including institutional investors and their representatives, are concerned that significant or controlling shareholders will put their own interests before those of the company.

In order to reassure institutional and minority shareholders of the added value of the controlling shareholder model and to persuade them to invest in companies that have adopted this model, a relationship agreement gives companies and their shareholders a chance to **define how the company's decisions will be in the company's interests**.

3. FOR WHICH COMPANIES ?

Provision 8.7 of the 2020 Code applies to **listed companies**, i.e. those whose shares are traded on a regulated market. This scope is in line with international practice. It is worth remembering that, like the rest of the 2020 Code, this provision is subject to the 'comply or explain' principle, meaning that deviations are permitted so long as they are properly justified. In this case, the 'comply or explain' principle only applies **to holding a debate on the appropriateness of a relationship agreement**. Entering into such an agreement therefore remains optional under the 2020 Code.

4. FOR WHICH SHAREHOLDERS ?

Provision 8.7 of the 2020 Code applies to **significant or controlling shareholders**.

The concept of a controlling shareholder is legally defined in CCA Articles 1:14 to 1:18. Control is defined as:

- either holding, in law or in fact, the majority of voting rights (more than 50%) at the general meeting;
- or the ability, in law or in fact, to exercise decisive influence on the appointment of the majority of directors or managers;
- or the ability to exercise decisive influence over the direction of the company's management.

Control may be exercised individually or jointly with other shareholders. Note that control is not necessarily synonymous with holding 50% or more of the company's shares. In practice, not all shareholders are involved in the decisions taken at the general meeting and this may mean that a majority of the votes present or represented gives rise to a presumption of de facto control if the shareholder in question held the majority of votes at two consecutive meetings (see CCA Article 1:14, §3), even if this majority is less than 50% of the company's capital. This is all the more true for companies where a multiple or 'loyalty' voting right applies.

There is no legal definition of the concept of a **significant shareholder**[1]. A shareholder is considered significant when it holds a 'significant' share of a company's capital, though there is no numerical threshold. The authors of the Code aimed to give parties the option to decide whether a shareholder is significant.

[1] In contrast, the concept of significant influence is defined in CCA Article 1:21 and is presumed when a company holds at least one fifth of the voting rights in another company.

5. WHAT CAN A RELATIONSHIP AGREEMENT GOVERN?

5.1. General principles

The 2020 Code merely recommends that a debate be held on whether a relationship agreement is appropriate. It does not include any particular requirement as to the content of such a relationship agreement. If, following a debate within the board, a relationship agreement is deemed as possibly having added value for the company, **it is up to the board to decide, alongside the significant or controlling shareholder(s), on the suitable content of this agreement**. A certain degree of flexibility is necessary in order to tailor the relationship agreement to the company's specific situation.

As a general rule, a relationship agreement **may focus on the specific relationship between the significant or controlling shareholder, the company and its board**. It may set out the principles to be followed to contribute to the pursuit of the company's interests.

As such, relationship agreements ideally contain 'win-win' provisions beneficial to both the company and its significant or controlling shareholder.

A relationship agreement must **avoid duplicating (and, of course, contradicting) existing rules**. It is therefore not a new code, articles of association or corporate governance charter. However, as mentioned above, as a reference framework it may recall and provide a useful supplement to the rules set out in the Code, articles of association or corporate governance charter.

It is worth remembering that a relationship agreement may contain **firm commitments, statements of intent,** or a combination of the two; it is important to make a clear distinction between these two types of provisions.

As the content of the agreement varies substantially from company to company, the following information is provided for illustrative purposes.

5.2. Main elements to promote the company's interests

a. Alignment of the vision of the company and the significant or controlling shareholder with the company's goals[2] (corporate purpose)

A relationship agreement may contain a series of provisions that help ensure that the company is run with its long-term interests in mind. This includes in particular:

- **A clear definition of the company's goals.** Notwithstanding the fact that the articles of association define the company's goals and purpose, the company and the controlling shareholder can use a relationship agreement to explain in greater detail their vision of the company's goals (corporate purpose) and the shareholder strategy itself. This will make it easier to devise the strategy for incorporating the interests of the various stakeholders.

- **A definition of the information shared with the significant or controlling shareholder and the framework within which this information is shared.** A relationship agreement could

[2] According to CCA Article 1:1, one of the company's goals must be to distribute or procure for its partners a direct or indirect financial advantage. Logically, profit is not a company's only goal. This is why the Code talks about one of the goals. A company's articles of association may expressly specify said company's goals, though this is not mandatory. In any case, these goals must be compatible with the articles of association and consistent with the company's activities, mission and values.

specify, in accordance with legal provisions, more specifically the Market Abuse Regulation, what information the board must share with the significant or controlling shareholder regarding the company's affairs, bearing in mind that this shareholder needs information for its own reporting and because, under certain legislation (e.g. GDPR, competition law), the significant or controlling shareholder may be held liable for the actions of the listed company. The board's communications must be fair and transparent, and must clearly and systematically demonstrate how its decisions serve the company's interests.

b. Independent decision-making in the company's interests

A relationship agreement may also clarify measures to ensure the autonomy of the company's decision-making bodies, in order to focus their decisions on achieving the company's goals:

- **Rules on the composition of the board**. A relationship agreement may provide for a minimum number of independent directors, as well as lay down rules on the composition of specialised committees.
- **Clear principles on the appointment of directors proposed by the significant or controlling shareholder**. A relationship agreement may include rules that establish the number of directors that the significant or controlling shareholder is authorised to propose, the competences and qualities required of these directors, and the appointment and dismissal procedures to be followed, cementing the role of the nomination committee as well as the proposing role of the board.

c. Strict compliance with principles of good governance

A relationship agreement may also contain a series of provisions that ensure that the company is run with its interests in mind with a view to creating sustainable value:

- **Strict compliance with the rules on conflicts of interest.** Without necessarily formulating new rules, a relationship agreement may clarify the commitment of the significant or controlling shareholder to comply with best practices, legislation and the recommendations of governance codes on the prevention of conflicts of interest.
- A judicious, transparent and well thought-out **use of double voting rights** possibly granted to significant or controlling shareholders.

6. HOW CAN THE RELATIONSHIP AGREEMENT BE IMPLEMENTED IN PRACTICE?

Should a company and its significant or controlling shareholder(s) choose to enter into a relationship agreement, this agreement must be implemented. Again, the 2020 Code does not specify how this should be done. It will depend on whether the provisions contained in the document are binding. If the parties opt for declarations of intent, these will have to be considered as not legally binding. In contrast, if they choose binding provisions, the parties may demand their enforcement by any legal means, including legal action. In any event, the company may implement voluntary measures needed to ensure compliance with the relationship agreement. A number of principles may prove useful in this regard.

- **Transparency**. As the stakeholders in this agreement are the significant or controlling shareholder and the company, a relationship agreement constitutes an **important document for the board** as it sets out the rules of cooperation and consultation between these two partners. Sufficient and appropriate transparency vis-à-vis the other shareholders is advisable, and even necessary if this information is sensitive within the meaning of the Market Abuse Regulation. This could be achieved by disclosing all or part of the content of the relationship agreement **on the company's website** and/or publishing a report on the implementation of the agreement in the **annual report**.

- **Control and monitoring**. The company may establish **internal control procedures** in order to periodically monitor the implementation of the relationship agreement.

It should also be noted that, as a transaction between the company and its significant or controlling shareholder, the conclusion of a relationship agreement could potentially be subject to the rules on transactions between related parties (CCA Article 7:97). This will need to be monitored in any case.

If necessary, the company should periodically review the provisions of the relationship agreement so as to align it with changes in the company's situation and its relationship with its shareholders.

.