

# CORPORATE GOVERNANCE COMMITTEE PRIVATE FOUNDATION

## Outcome of the public consultation

### 1 Some overall conclusions – Executive Summary

Within a time frame of two months the Commission received **49 reactions** to the public consultation. Reactions came from 40 stock-listed companies, of which 12 BEL 20, 11 BEL Mid, and 12 BEL Small. Furthermore, we received reactions from 7 governance **experts** and **2 organisations** (VBO-FEB and IBR-IRE).

Overall, the **reactions to the Code are positive to very positive**. The Code has a **positive influence on board effectiveness** and raises consciousness while at the same time stimulating good governance practices. Respondents indicate that it is **too early to conclude on the effect of the Code on long term value creation**, but many of them support the view that improved governance practices will create benefits for the continuity and development of companies. Moreover the **costs involved are considered minor in comparison to the advantages**.

Respondents were also asked to **rank their appreciation with the Code**, evaluating its effectiveness, its structure and scope, the ‘comply or explain’ features as well as the disclosure demands. **Overall the appreciation for the Code is very high:**

- With an average score of 8.37 (on a 10-point scale) the ‘comply or explain’ principle receives the highest score, demonstrating the overwhelming support for the flexibility the Code offers.
- But also the other characteristics of the Code receive positive evaluations, with average scores of 7.71 -effectiveness of the Code-, 7.61 -structure and scope of the Code-, and even the disclosure demands receive an average score of 7.58!

The analysis of the comments received clearly shows what major areas of improvement are:

- The **need of adaptation of the Code** to the new European directives and Belgian legislation, taking also into consideration the development of governance practices and statutory rules in the neighbouring countries. However, the respondents underline that there is no need for making

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important changes to the current Provisions and Guidelines.

- The need for the Code to better comment and explain **the complementarity between the Code and the relevant legislation**. Where the Code sets requirements that go beyond the legal provisions (like for independent directors, term of a board mandate, proposals to the AGM), it should be very clear why this is the case. In this matter it is also important to discuss to what extent the Code should anticipate to the relevant European legislation.
- Although the overall structure of the Code is approved, **special attention should be paid to the distinction between Provisions and Guidelines**. Moreover, quite a number of suggestions are given for additional information and guidelines, to be provided by the Commission (either in the Code itself, in the appendices or through specific position papers). It has also been suggested to complement the Commission's website with references/links to relevant national and European legal dispositions.
- The **'comply or explain' approach is greatly appreciated for its flexibility**. For this reason the Commission should raise awareness that a company also applies the Code when it gives clear and **unambiguous explanations** to why it deviates from some of the Code's Provisions.
- The **risk of box-ticking does not seem to be important and can substantially be decreased** by focusing more on governance changes and improvements in the Governance Chapter, and highlighting the willingness to live up to good governance in the Governance Charter.
- The **distinction between Governance Charter and Chapter is considered superior to integrating both into one single document**. However respondents ask for **further fine tuning** between the two.

## 2 Overview per question of the main lessons learned

### ISSUE 1: EFFECTIVENESS OF THE CODE

#### 1.1 Does the Code support better board performance and long term value creation?

For what concerns the EFFECTS of the Code, a distinction has to be made between the effects on board performance and on long term value creation:

- There are clear indications of a positive effect on better board performance, thanks to:
  - The fact that the Code offers a relevant reference framework which helps to better structure, formalise, organise, discipline and evaluate the board (and its members).
  - The role of independent directors.
  - The creation of different committees.

- Increased transparency.
- However, it is not possible today to decide its effect on long term value creation:
  - The experience with the Code is too short to have a view on its long term effect.
  - Nevertheless ‘assumptions’ are that the compliance with the Code could positively affect long term value creation due to:
    - Positive impact of compliance with the Code on image, attractiveness, credibility.
    - Focusing more on the drivers and the risks involved.

## **ISSUE 2: STRUCTURE AND SCOPE OF THE CODE**

### **2.1 To what extent do you feel that the Principles, Provisions and Guidelines are sufficiently clear?**

- Overall, respondents are rather positive on the structure of the Code:
  - Principles are easy to understand, well balanced and give a general view of the Code.
  - The annexes support a proper interpretation of the Code.
- However, special attention should be paid to the distinction between Provisions (for which comply-or-explain holds) and Guidelines (which are only complementary and for which the rule of comply-or-explain does not hold). Quite a number of examples are given where there is doubt whether it should be a Guideline or a Provision, or where more guidance is advisable. From an ‘enforcement’ perspective this choice between Provision and Guideline is not neutral and therefore deserves additional reflection.

### **2.2 To what extent does the Code reach the aim to be complementary to the relevant legal dispositions?**

This question raises quite a lot of comments:

- The Code should be more explicit on its position in relation to the relevant legal dispositions<sup>1</sup>. First of all additional comments on the complementarity between both seems to be highly welcomed.
- Regular verification of the Code’s Provisions in comparison with the evolution of the legal dispositions seems to be well-supported (e.g.

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<sup>1</sup> Although this primarily relates to the Code on Companies, reference is also made to some specific (stricter) rules, e.g. for financial institutions (CBFA).

updating/deleting Guidelines and/or Provisions where new legislation is in force).

- Especially explanation should be given on those domains where the Code deviates from applicable legislation :
  - The definition of independent directors<sup>2</sup>
  - The term of the mandate of a director
  - The minimum level of shareholding to make propositions for the agenda of the general shareholders' meeting.

The reasons behind such deviations should be (better) explained in the Code, as well as the fact that explanations should go beyond mere reference to the legal provision.

### **2.3 To what extent do you consider the Code to be complete?**

- a. Topics not sufficiently treated?
- b. Topics that are missing?
- c. Topics that need additional Provisions or Guidelines?

Quite a number of suggestions are given for additional information and guidelines. The topics in relation to shareholders will be treated in point 2.4.

Since it is a rich set of suggestions, only some of the most prominent examples will be cited here:

- A domain that deserves much more detailed guidelines seems to be the Provisions on the transparency of executive remuneration and main features of executive's contracts.
- Also the task of the board in relation to risk management, internal control, whistle blowing, etc. requires additional guidelines.
- It is advised that the Code should or could be more explicit in relation to:
  - the role of the board in structural changes and change of control
  - the role of the board in relation with the maximisation of value creation for shareholders
  - the role of the board in relation with (other) stakeholder interests,
  - diversity within boards, with special attention for gender diversity,
  - meetings between non-executive directors,
  - the role of the chairman, the secretary general,
  - internal governance.

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<sup>2</sup> The point of independent directors also raises other reactions, such as their designation (by the general assembly), their relative importance (% instead of absolute number), etc.

## **2.4 Does the Code give sufficient attention to the role of the shareholder and the function(ing) of the shareholders' meeting?**

- The attention paid to minority shareholders is much appreciated, as well as the fact that the Code recognises the existence of controlling/important shareholders.
- Many respondents suggest attaching more importance to the 'duties' or 'obligations' of shareholders and not only to their rights.
- More generally, respondents indicate that the Code could give more guidance
  - On shareholder meetings, its role, its organisation, etc.
  - The relationship between the board and the shareholders.
  - Behaviour of shareholders, potential abuse of shareholder rights.
  - Transactions between the company and the controlling/important shareholders.

### **ISSUE 3: THE 'COMPLY OR EXPLAIN' APPROACH**

#### **3.1 Does the 'comply or explain' option offer sufficient flexibility for the corporate governance of listed companies?**

The comply or explain approach is greatly appreciated for its flexibility, not only in terms of making the Code accessible to different types of companies, but also in relation to the evolution of a company. However, (especially the smaller) companies fear that too many explanations would create a negative image. Respondents stress the importance of clear, specific and unambiguous explanations. Therefore they consider it to be the Commission's task to create awareness that an 'explained' deviation also leads to good governance practices.<sup>3</sup>

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<sup>3</sup> Statement of the European Corporate Governance Forum, on the principle "comply-or-explain", March 2006, [http://ec.europa.eu/internal\\_market/company/ecgforum/index\\_en.htm](http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm)

### **What could or should be added to the Code's recommendations to better mitigate the risk of box-ticking?**

Overall, the risk of box-ticking does not seem to be important:

- Quite a number of respondents consider such a risk to be unavoidable. However, they state that “the more you follow the Code, the more you follow its spirit”.
- Others state that the risk would be much higher if there were no possibilities to explain deviations.
- Some do not perceive ‘box ticking’ to be a risk.

Interesting suggestions given in this respect are:

- Respondents suggest that we better explain the content of the yearly reporting in the Governance Chapter.
- Respondents state that companies should also reflect on the statements in the preamble.

### **3.2 Is the compliance with and the deviation from the Code sufficiently monitored?**

Overall the respondents do consider that the Code is sufficiently monitored. Given the transparency with the Governance Charter and the Governance Chapter, the market (the shareholders) can play their role in monitoring the governance quality. Also the periodic research on compliance with the Code (CBFA; GUBERNA/VBO-FEB) highly contributes to improve the monitoring.

## **ISSUE 4: DISCLOSURES ON THE IMPLEMENTATION OF THE CODE**

### **4.1 To what extent is the relationship between the corporate governance charter and corporate governance chapter (annual report) adequate?**

The combination of a Governance Charter and a Governance Chapter is considered superior by the respondents, however, further fine-tuning between the two seems to be necessary (e.g. shareholding structure in the annual information, rather than in the charter).

#### **4.2 Is the cost of complying with the disclosure recommendations proportionate to the benefits of such disclosure?**

Nearly all respondents state that the costs are minor in comparison to the advantages involved. However some state that the costs are rather visible, while it is more difficult to evaluate the benefits.

#### **ADDITIONAL COMMENTS AND SUGGESTIONS**

##### **Do you have any other comment or suggestion on the Code you would like to make to the Committee?**

There are a number of interesting suggestions and comments. To summarise the most important ones:

- Regularly check the content of the Code in comparison to international evolutions in EU Directives implementation, recommendations and practices (especially in neighbouring countries) and in European directives & recommendations (where the Code could anticipate upcoming national legislation).
- Although stressing the need for regular updates (e.g. every 4 years), continuity in (the basic elements of) the Code is considered even more important. Important changes should again be submitted to public consultation.
- Develop a number of practical guidelines, checklists, examples or model procedure (e.g. in the appendices, in position papers, etc.).
- Integrate on the website of the Commission also relevant (links to) national and European law.

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