



Corporate  
Governance  
COMMITTEE

**PUBLIC CONSULTATION**

# **Proposed Revisions to the Belgian Code on Corporate Governance**

**Appendix B – Consultation Document**

## INTRODUCTION

### General approach

The Belgian Code on Corporate Governance (hereinafter ‘the Code’) was published for the first time on December, 9 2004 and was thoroughly revised in 2009. Since June 2010, the 2009 Code has been recognized by Royal Decree as the reference code for Belgian listed companies.

The main objective of the Belgian Corporate Governance Committee (hereinafter ‘the Committee’) is to ensure that the provisions of the Code remain relevant to the listed companies and are regularly updated in line with practice, legislation and international standards.

At the international, European and Belgian level, the legal corporate governance framework has undergone considerable evolutions. The corporate governance Codes in various countries have also been (recently) changed. This is therefore an impulse that cannot be ignored.

In addition, a revision of the current Company Code is underway within the federal government, under the leadership of Minister of Justice, Koen Geens. This revision will also have an impact on how listed companies are structured and governed. In order to offer listed companies a reference framework of 'hard' and 'soft law' that is coordinated with each other, it is important that the Code takes into account a number of changes that will be implemented in the revised Code on Companies and Associations (such as the introduction of the dual system).

For all the reasons mentioned above, the Committee started in 2016 with a reflection on a possible revision of the 2009 Code. To this end, the Committee commissioned Allen & Overy to carry out an independent study on the positioning of the 2009 Code with regard to other European countries. Based on the results of this study, but also on the basis of a review of various European and international corporate governance codes and best practices, the Committee has developed a proposal for a revised Belgian Code on Corporate Governance.

The Committee was assisted in its proceedings by its Permanent Working Group<sup>1</sup>.

### Structure

The forthcoming Code focuses on the essential features of corporate governance. It adopts a principle-based approach, in opposition to a ‘ticking-the-box’ approach: the conformity with the Code is assessed with respect to both its letter and its spirit. In this respect, while the forthcoming Code guides listed companies on the basis of fundamental Principles, it aims at giving listed companies more freedom and rendering their directors and management more accountable on their respect of the Code.

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<sup>1</sup> The Permanent Working Group is chaired by Philippe Lambrecht (director & secretary-general, VBO-FEB) and consists of the following members: Prof. dr. Lutgart Van den Berghe (Executive Director, GUBERNA), Annelies De Wilde (Senior Research Associate, GUBERNA), Malorie Schaus (Deputy Advisor, FEB), Sonja D’Hollander (coordinator supervision of listed companies, FSMA), Anne-Sophie Pijcke (special advisor, Euronext Brussels) and Marc Bihain (secretary-general, IBR-IRE). Thomas Leysen, Benoît Bayenet and Franck Donck also participated in the drafting sessions.

The forthcoming Code also aims at a better readability with a specific focus on principles that are further developed in provisions (guidelines are no longer provided for), the insertion of sub-titles and the removal of the Appendices (greatly repeating the applicable Belgian law). The revised Code introduces new concepts and removes others. Some of the more procedural aspects of the current Code have been eliminated. These are still important, but are now common business practice and therefore are not included in the revised Code, which strives to raise standards.

The forthcoming Code adopts a strongly-entrenched logical order around 10 Principles: from the choice of the governance structure to the public reporting of the application of the Code, and in passing through the respective roles of the board and the executive management, the issue of remuneration and the interaction of the company with its shareholders.

**Q1. Do you agree to eliminate legal requirements which are provided for in the Company Law and in this respect avoid duplication?**

**Q2. Do you agree with the approach of the Committee to focus on the essence and to eliminate in this respect the guidelines?**

**Q3. To help listed companies, the Committee may foresee to develop additional explanatory notes in the future. On which topics would it be useful to develop such explanatory notes?**

## **Disclosure**

Disclosure is essential for corporate governance and crucial to allow effective external monitoring. Through disclosure, the Code seeks to achieve a high level of transparency.

Transparency is achieved through disclosure via two different documents: the Corporate Governance Charter, posted on the company's website, and the Corporate Governance Statement, a specific section of the annual report.

In its Corporate Governance Charter, the company must describe the main aspects of its corporate governance, such as its governance structure, the terms of reference of the board and its committees as well as other important topics. The Corporate Governance Charter should be updated regularly.

The Corporate Governance Statement is legally required and should include more factual information relating to corporate governance.

**Q4. Do you agree to keep disclosure through two different documents: the Corporate Governance Charter and the Corporate Governance Statement?**

## Compliance

The Code is based on the ‘comply or explain’ principle. This principle is recognised by Directive 2006/46/EC, which states that listed companies shall publish a corporate governance statement. It is also the object of a European Commission Recommendation of 9 April 2014 on the quality of corporate governance reporting (‘comply or explain’).

The flexibility provided by the ‘comply or explain’ principle has been preferred to a strict and rigid application because it allows for account to be taken of company’s specificities such as size, shareholding structure, activities, exposure to risks and management structure. Based on the “Practical rules for high-quality explanations”, Principle 10 of the Code comprises a provision on what constitutes a good explanation.

**Q5. Is the definition of a good explanation in Principle 10 clear to you? What amendments would you suggest?**

## Application of the Code

The Code applies to companies incorporated in Belgium whose shares are admitted to trading on a regulated market (‘listed companies’). However, given its flexibility, the Code could also serve as a reference framework for all other companies.

The forthcoming Code will be the third edition of the Belgian Code on Corporate Governance. The intention of the Committee is to harmonize the entry into force of the forthcoming Code with the entry into force of the forthcoming Code on companies and associations. In this perspective, the forthcoming Code will apply compulsorily to reporting years beginning on or after 1 January 2020 (‘compulsory application’). However, the company may already choose to apply the forthcoming Code for reporting years beginning on or after 1 January 2018 (‘optional application’). In both cases, the forthcoming 2020 Code will supersede and replace the Code issued in 2009.

**Q6. Do you have any concerns regarding the proposed Code application date? What are your views on having a double ‘entry into force’ date (optional application vs compulsory application)?**

## THE CONSULTATION AND HOW TO RESPOND

### Objective of the public consultation

This public consultation aims to capture the comments of the listed companies and all parties involved on the proposal of a revised Code. Comments on all parts of the Code are welcome, but the Committee is particularly interested in visions and suggestions regarding the most important changes compared to the 2009 Code.

### How to submit your contribution?

Interested parties may respond to the public consultation by responding to the questions in this consultation document. A full list of questions can be found at the end of this paper. If you wish to make general comments not relating to a specific question, please state clearly the Principle or Provision the comment relates to, so that these can be more effectively captured as part of the post-consultation review.

Responses should be sent to the Committee (either by uploading it via the website of the Committee through the “Give your opinion” button or via email [infocgc@vbo-feb.be](mailto:infocgc@vbo-feb.be)).

A public hearing will be organized at the end of the public consultation. The date and venue of this hearing will be announced at the end of January 2018 on the website of the Committee.

### Closing date for comments

The closing date of the public consultation is 28 February 2018.

### Publication of reactions

All responses will be published on the website of the Committee at the end of the consultation period, unless the respondents specifically request that they be treated as confidential.

### Next steps

Taking into account the comments and other relevant developments, the Committee hopes to adopt by June 2018, a final text of the revised Code, as well as a report with the findings and conclusions of the public consultation.

Subject to recognition of the revised Code by means of a new Royal Decree, the revised Corporate Governance Code would enter into force on 1 January 2020 (mandatory compliance) with the possibility for companies to apply the revised Code as from the financial year 2018 (optional application).

## CONSULTATION ON CHANGES TO THE BELGIAN CODE ON CORPORATE GOVERNANCE

### **Principle 1. The company shall make an explicit choice regarding its governance structure and clearly communicate its choice**

This principle is a new one and explains that companies must make an explicit choice about which governance model they want to use. Once the governance model chosen, this has to be correctly translated and reflected upon every 5 years.

**Q7. In your opinion, is it useful to reflect every 5 years upon the governance model of the company?**

### **Principle 2. The board and the executive management shall remain within their respective remit and interact constructively**

This principle focuses on the essential roles of the board and of the executive management and its interaction.

**Q8. The Committee has put the focus on the fact that the board should pursue the sustainable value creation by the company and that it thereby should pay attention to the interests of all stakeholders. Do you agree that this is the way forward on how companies should be led?**

**Q9. According to the Committee, the board has three different roles to play (strategic role, leadership role, monitoring role). Do you agree with this viewpoint?**

### **Principle 3. The company shall have an effective and balanced board.**

This principle reproduces to a large extent the old principle 2. However, more attention is given to the respective roles of the chair and the company secretary.

**Q10. The Committee pleads for having the independence criteria in the Code (and not in the law) and to put a 'catch-all' definition in the law. Are you supportive of this approach?**

**Q11. Do you believe that the Committee has been exhaustive in its description of the role of the Chair? Are there any essential tasks missing?**

**Q12. Do you believe that the Committee has been exhaustive in its description of the role of the company secretary? Are there any essential tasks missing?**

### **Principle 4. Specialised committees shall assist the board in the execution of its responsibilities**

The Committee decided to eliminate all appendices and integrate them as much as possible in the principles itself. This was particularly true for this principle. As a lot of the provisions regarding board committees in the appendix were already accounted for in Belgian law, they could be deleted.

**Q13. Do you think the Committee followed the right approach by focusing on the essential characteristics of corporate governance, deleting more detailed provisions, guidelines and appendices, and thus rendering the Code more concise? Has the Committee disregarded certain aspects relating to board committees?**

**Q14. The Committee puts forward in greater detail what the duties of board committees are and what their role is vis-à-vis the board. Do you agree with the drafting of the revised provisions?**

**Q15. The Committee elaborated further on the duty to provide a more substantial feedback of each committee meeting to the entire board as the board is still a collegial organ and jointly responsible. Do you think that this approach is justified?**

#### **Principle 5. The company shall have a rigorous and transparent procedure for the appointment of board members**

This principle is dedicated to the appointment of board members. The Committee decided not to change a lot to this principle in comparison with the old principle 4.

**Q16. The Committee has tightened the provision regarding the appointment of a former CEO as the Chair of the board. Do you think that this approach is justified?**

**Q17. The Committee has introduced a provision on the nomination and appointment of the Chair. According to the Committee, the Chair plays a crucial role in the functioning of the board. In this respect, do you think that the Chair needs to dispose of other characteristics than those mentioned in the provision?**

**Q18. The Committee has put more focus on the succession planning of the board members and the old guideline on this topic has become a provision. Do you agree that it is important to give more attention to the succession planning of board members?**

#### **Principle 6. All board members shall demonstrate independence of mind and shall always act in what they consider the best interest of the company**

This principle emphasizes the role of the board in exercising independent judgement and discretion and the attention that should be given to (potential) conflict of interests.

**Q19. The Committee is convinced about the importance of independence of mind, not only for independent directors but for all board members. What are your views on this matter?**

**Q20 Do you agree that all directors should pursue the interest of the company first (and not only the independent directors)?**

**Q21. Do you agree that an increased attention should be given to conflicts of interest on the board? What are your views about the integration in the Code of potential conflicts of interests?**

#### **Principle 7. The company shall remunerate board members and executives fairly and responsibly**

This principle is dedicated to the remuneration practices of board members and executives (in line with the old principle 7). The Committee deleted various provisions which were already accounted for in Belgian law. The Committee tried already to take into account the propositions as set out in the Shareholders' Rights Directive<sup>2</sup> which was adopted by the European Commission in 2017.

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<sup>2</sup> Directive 2017/828/EU of the European Parliament and of the Council as regards the encouragement of long-term shareholder engagement

**Q22. The Committee puts an enlarged focus on a well-elaborated remuneration policy for board members and executives. The Committee adds that this policy should be aligned with the company's strategy and in line with the overall remuneration framework of the company. Do you agree with this approach?**

**Q23. The Committee wants to stimulate share-based remuneration for non-executive directors. What is your opinion on this matter? Should the Committee make more explicit the amount of the remuneration which should be given in the form of shares?**

**Q24. The Committee introduced a claw-back for variable remuneration. Do you agree that it is good practice to introduce such a claw-back in the contract of executives?**

**Q25. The Committee wants to question the time span in which stock options could be vested and be exercised? What is your opinion on this subject?**

### **Principle 8. The company shall treat all shareholders equally and respect their rights**

This principle is dedicated to the (rights of the) shareholders and the dialogue with the company (in line with the old principle 8). The Committee deleted various provisions which were already accounted for in Belgian law.

**Q26. The Committee introduced the concept of 'relationship agreements' for protecting minority shareholders, in accordance with the example in the UK. What are your thoughts regarding this concept?**

**Q27. As the Code is oriented towards the board and its members, the Code cannot enforce provisions onto shareholders and/or institutional investors. The Committee tries nevertheless to encourage communication and dialogue. Do you think that the Committee succeeded in its aim?**

### **Principle 9. The company shall have a rigorous and transparent procedure for the evaluation of the company's corporate governance**

The Committee decided to dedicate a specific principle to the evaluation of the company's corporate governance. This principle goes beyond the old provision 4.11 where the focus was only on the functioning of the board. The evaluation must be carried out against the principles and the provisions as set out in proposed revisions to the Belgian Code on Corporate Governance.

**Q28. According to the Committee, the evaluation of a company's corporate governance consists of an internal monitoring by the company itself, complemented by an external monitoring through the capital market. Do you agree that this is the right approach in evaluating a company's corporate governance?**

**Q29. The Committee believes that an evaluation exercise should be carried out every three years. Do you agree that this is an appropriate periodicity?**

**Q30. Do you think that the Committee should render the assistance of external experts in the evaluation process compulsory?**



## **Principle 10. The company shall publicly report on the application of the Code**

The Committee decided to incorporate its practical rules for high quality explanations into the forthcoming Code because the Committee wants to focus even more on the 'comply or explain' principle and to demand increased attention for the quality of the 'explains'. This is also in line with the vision of the European Commission who published in 2014 a Recommendation on the quality of corporate governance reporting ('comply or explain')<sup>3</sup>.

**Q31. Do you think it is a good idea to integrate these practical rules for high quality explanations into the forthcoming Code?**

**Q32. How can we convince shareholders and/or institutional investors to consider more carefully the 'explains' given in order to raise the quality of the 'explains'?**

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<sup>3</sup> Recommendation 2014/208/EU.

## LIST OF CONSULTATION QUESTIONS

*If you wish to make general comments not relating to a specific question, please state clearly the Principle of Provision the comment relates to, so that these can be more effectively captured as part of the post-consultation review.*

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Q30. Do you think that the Committee should render the assistance of external experts in the evaluation process compulsory?

Q31. Do you think it is a good idea to integrate these practical rules for high quality explanations into the forthcoming Code?

Q32. How can we convince shareholders and/or institutional investors to consider more carefully the 'explains' given in order to raise the quality of the 'explains'?